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IN THE

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OF

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CASES DECIDED

IN THE

Supreme Court of Appeals

OF VIRGINIA.

Wytheville.

CITY OF RICHMOND v. RICHMOND SAND AND GRAVEL CO.

June 13, 1918.

Absent, Burks, J.

1. NUISANCES—*Limitation of Actions—Laches—Estoppel.*—In a suit for an injunction against a nuisance and for damages, where the nuisance was caused by defendant's sewer emptying into a creek which passed through plaintiff's land, defendant set up as grounds of defense the statute of limitations, laches and estoppel. It appeared that a 24-inch sewer was built after August 15, 1911, when plaintiff bought the property, and plaintiff's bill was filed November 15, 1914, within less than five years from that date. Before the installation of the 24-inch sewer there had been a 12-inch sewer, but very little sewage flowed through it—not enough to cause the injury complained of. So that, in point of fact, the nuisance, which it was the purpose of this suit to abate, was created within less than five years before its institution.

   Held: That the chancery court correctly overruled the defenses of laches, estoppel and the statute of limitations.

2. EASEMENTS—*Drains and Sewers—Construction of Deed.*—A deed conveying part of a tract of land (consisting of 47.5 acres) provided that the grantee should have a right to construct a sewer through the property of the grantor. The deed contemplated the use of the easement not only for the drainage of the 47.5 acres conveyed, but also as essential to the drainage of an incorporated town, and other lands not included in that particular tract.

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Held: That the easement was not appurtenant to the 47.5 acres conveyed by the deed. It was either an easement in gross, or else extends the area of the land to which it is appurtenant, so as, at least, to include land naturally drained by the channel. If it is to be regarded as an easement in gross, it is still "an interest in land," and, therefore, may be disposed of by deed or will under the statutes of this State. Code 1904, sections 2418, 2548.

Appeal from a decre of the Chancery Court of city of Richmond. Decree for complaint. Defendant appeals.

Reversed in part and affirmed in part.

The opinion states the case.

H. R. Pollard and *Geo. Wayne Anderson,* for the plaintiff in error.

S. A. Anderson and *Hill Carter,* for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

On November 15, 1914, appellee, the Richmond Sand and Gravel Company, which we shall refer to as plaintiff, filed its bill against appellant, the city of Richmond, designated as defendant, and the Richmond Land and Improvement Company, in which it showed: That on August 15, 1911, it purchased from the Richmond Locomotive Works 131.7 acres of land in Henrico county, adjoining Highland Park, which land, along with that town, by annexation proceedings became a part of the city of Richmond November 5, 1914. The deed stipulated that there should be no pollution of the stream flowing through the land, which would render it unfit for use, or offensive to any lower riparian owner, especially to the grantor or its grantees. Afterwards, against the objection of plaintiff, the town of Highland Park

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constructed a sewer leading into its land and emptying into Shockoe creek, which is offensive to the smell and dangerous to health and destructive to the value of its land on both sides of the creek. That the land is very valuable for its large deposits of sand and gravel, which plaintiff at one time undertook to work and utilize, but could not on account of the offensive smell. That machinery and structures purchased at great expense for working the sand and gravel were abandoned on account of the sewage, and loss amounting to many thousands of dollars was sustained. That employees of plaintiff were made sick, and forced to vacate a house owned by plaintiff on the land and refused to work by reason of the stench from the sewage. That the flow of sewage has not only been continued against the objection of plaintiff, but has been increased by the construction of other sewers by the town of Highland Park, which have continued to empty their sewage into the original sewer, and has thereby increased the flow of sewage over plaintiff's land. That the nuisance has rendered the deposits of sand and gravel on the land valueless and unfit for use, and prevented plaintiff from either working them or selling them to other persons. That on June 4, 1912, plaintiff conveyed 47.5 acres of its land next to Highland Park to the Richmond Land and Improvement Company, and the sewage from the town is emptied on the land so conveyed, but continues to flow through plaintiff's part of the land for the distance of 2,100 feet, and is dangerous and destructive to health and the value of its property. That defendant and its officers have been notified of plaintiff's objections to the sewer, but still allow its use, to the great damage of plaintiff and its property. The bill prays for an injunction against the nuisance and for damages.

At the request of the defendant, the Highland Park Development Corporation and J. M. Atkinson and wife were made parties to the suit.

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Defendant, by answer, sets up three grounds of defense:

"(1) That the complainant and those under whom it claims are guilty of laches for their failure to assert by suit their right against the use of the sewer of the drain, ravine and branch by those under whom respondent claims, it being a fundamental principle of a court of equity that, 'Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence.'

"(2) That the statute of limitations is a bar to the prosecution of this suit by the complainant, more than five years having elapsed since the creation of the alleged nuisance * * * And,

"(3) That complainant is estopped by its conduct and acquiescence in the use of the drain, ravine and branch as an open sewer, it having been the duty of complainant, or those under whom it claims, many years ago to have objected to the use of the said drain, ravine or stream for sewer purposes."

Evidence was taken, and in consequence of developments made by the testimony of one of the witnesses (Civil Engineer E. D. Redd), defendant a few days thereafter moved the court for leave to file an amended and supplemental answer, which was granted.

The supplemental answer, in substance, averred: That in pursuance of a resolution of the council of defendant, approved May 14, 1915, the city attorney was authorized to contract for the purchase of all the sewers, sewer rights and easements owned by the Highland Park Development Corporation laid or maintained in the streets or alleys of Highland Park addition; that defendant had contracted with the Highland Park Development Corporation, for the consideration of $300, for the purchase of all right, title and interest in and to an easement which the Highland Park Development Corporation owns, acquired by the East End Building Corporation, which it acquired in a deed from

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the Richmond Land and Improvement Company, acquired by the latter by deed from plaintiff and J. M. Atkinson and wife, of June 4, 1912, which easement was described in that deed as follows: "The right to run a sewer pipe not exceeding thirty inches in diameter, which the said party of the third part (Richmond Land and Improvement Company) has a right to begin at a point on the land hereby conveyed (designated by a red star on the plat hereto attached) through the grounds of the said party of the first part, on and along the southwest side of Shockoe creek, within twenty feet of the southwest side of said creek; provided, however, said party of the first part is not to be liable for any damages from persons complaining of the use of said sewer, which is to run underground not less than two feet below the surface, except when on sudden depressions, and when they occur, not less than twelve inches below the surface. Said party of the first part and his vendees are to be entitled to connect their sewer pipes with said sewer of the said party of the third part free of charge. If the said party of the third part receives, or is paid any amount for the use of said sewers herein stipulated for, from Highland Park or others not occupying any part of the land herein conveyed, then and in that event, one-half of said amount so received or paid is to belong to and be paid to said party of the first part." The supplemental answer also averred that defendant was entitled to avail itself of this easement and right to construct the sewer through and along the property of plaintiff, and that if constructed and maintained it would entirely relieve any future pollution of the branch in question as well as of Shockoe creek.

Defendant maintained that if the court deemed the defenses set up in its original answer inadequate it should be permitted to construct a sewer along the easement for the purposes indicated; and prayed that, if necessary, the supplemental answer be treated as a cross-bill.

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The Highland Park Development Corporation, in its answer, set up the right in itself or its assignee to avail of the foregoing stipulation in the deed of June 4, 1912.

On November 1, 1916, the chancery court entered one of the decrees appealed from, and on December 13, 1916, passed a decree refusing to rehear the former decree. By the first mentioned decree the court expressed the opinion that plaintiff was entitled to a perpetual injunction restraining the defendant from emptying and carrying its sewage through, over, along and upon plaintiff's land, but refused to award the injunction at that time on account of the serious consequences which might ensue therefrom, and decreed that defendant should at once proceed to acquire by purchase or condemnation proceedings, or otherwise, an outlet or outlets and conduits for such sewage, so that it would cease to be a nuisance or injury to plaintiff's property; and in the event of its failure to carry out and perfect that requirement of the decree within a reasonable time, that plaintiff should be at liberty to apply to the court for the purpose of obtaining a perpetual injunction against the defendant as above indicated. The decree also contained a reference to a commissioner in chancery to ascertain and report what damages, if any, plaintiff had suffered and was entitled to recover from defendant by reason of the injuries complained of.

The learned chancellor, in his memorandum opinion, gives an accurate summary of the salient facts of the case. He shows that the sewer which caused the nuisance was not the twelve-inch sewer referred to in defendant's answer as exhibit No. 6; "that after the incorporation of Highland Park in 1908, it began the construction of a general paving and sewerage system; and in 1911 or 1912, upon the complaint of some of the citizens residing near this open ravine of its offensiveness, a large 24-inch sewer was constructed from the stack at Third avenue and Dill road

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down this ravine, the sewer ending at the corporate line of Highland Park and emptying into the open ravine. That there is now a continuous flow of sewage and filth in an open ditch a distance of five or six hundred yards into Shockoe creek at the plant of the plaintiff."

This sewer was built after August 15, 1911, when plaintiff bought the property, and the bill, as we have seen, was filed November 15, 1914, within less than five years from that date. Before the installation of the 24-inch sewer the ravine was usually dry and very little sewage flowed through it—not enough to cause the injury complained of. So that, in point of fact, the nuisance (which it is the purpose of this suit to abate) was created within less than five years before its institution. We are, therefore, of opinion that the chancery court correctly overruled the defenses of laches, estoppel and the statute of limitations, and accurately classified the case in judgment as coming within the influence of the line of authorities of which *Face* v. *Cherry*, 117 Va. 41, 84 S. E. 10, Ann. Cas. 1917 E, 418; *McKinney* v. *Trustees, etc.*, 117 Va. 763, 86 S. E. 115; and *N and W. Ry. Co.* v. *Allen*, 118 Va. 428, 87 S. E. 558, are types, and is not controlled by *Virginia Hot Springs Co.* v. *McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179.

But we are further of opinion that the rights of defendant by virtue of its purchase of the easement of a sewer line through the land of plaintiff ought first to have been determined before the decree appealed from, directing defendant to acquire an outlet or outlets and conduits looking to the installation of an adequate sewer system to abate the nuisance complained of, and ordering an inquiry of damages, was entered.

And with the view of expediting the final determination of this controversy, which affects the interests of the citizens of the Highland Park addition to the city, and the pub-

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lic, as well as the rights of the immediate litigants, we deem it advisable to pass upon the legal question raised by defendant's supplemental answer.

Under the circumstances of this case and in view of the objects obviously intended to be accomplished by the stipulation in the deed of June 4, 1912, hereinbefore set forth, we cannot assent to the proposition that the easement granted by that instrument could only be acquired by and transferred to an alienee of the land conveyed by that deed. The setting of the transaction in its entirety plainly shows that the supposed dominant tenement (the 47.5 acre tract), to which we are told the easement is alone appurtenant, constitutes only a link in a chain of properties, the owners of which possess, in common, natural rights of drainage along the proposed sewer line inherent to the location of their respective holdings, and not exclusively dependent for existence upon the work of man. The larger part of the land formerly included within the limits of the town of Highland Park, by reason of its location and the natural lay of the water-shed must seek outlet for drainage along a waterway or channel passing through the properties of the grantor and grantee in the deed referred to. Hence, in a broader sense, the territory mentioned constitutes a dominant section with respect to the outlet provided by nature for the common benefit of all affected by those natural conditions. 9 R. C. L. (III), p. 742.

The situation is such that it could not have been within the contemplation of the parties, that this easement of drainage should be indissolubly annexed solely to the 47.5 acres of land.

The correctness of this wider construction that we are disposed to place upon the provision of the grant is strengthened by the language: "If said party of the third part receives or is paid any amount for the use of said sewer herein stipulated for from Highland Park or others not oc-

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cupying any part of the land herein conveyed, then and in that event one-half of said amount so received or paid is to belong to and be paid to the party of the first part." We freely admit that if the premises of counsel, that the easement was appurtenant only to the 47.5 acres, were correct, their conclusion would follow, and the easement could not be divorced from the particular tenement by separate grant. 1 Minor on Real Prop., p. 117. But, as we have seen, the deed contemplated the use of the easement not only for drainage of the smaller tract, but also as essential to the drainage of Highland Park, and other lands not included in the particular tract. This view removes the easement from that class of appurtenant easements to which the principle invoked applies, and either constitutes it an easement in gross, or else extends the area of the land to which it is appurtenant, so as, at least, to include land naturally drained by the channel. If it is to be regarded as an easement in gross, it is still "an interest in land" and, therefore, may be disposed of by deed or will under the statutes of this State. Code, secs. 2418, 2548; 1 Minor on Real Prop., p. 115.

So that, in any aspect of the case, defendant was within its rights in acquiring the easement without purchasing the 47.5 acres of land. If, however, the city shall elect to use the easement in installing a sewer system through the land of plaintiff by virtue of its purchase, it must take the right subject to the obligation imposed by the deed of June 4, 1912.

The effect of our conclusions with respect to the questions raised by defendant's assignments of error incidentally disposes of the cross-error assigned adversely to plaintiff's contention.

For these reasons the decrees appealed from must be reversed and the case remanded for further proceedings in accordance with the views expressed herein.

Reversed in part and Affirmed in part.

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Syllabus.

Wythville.

CORBY BAKING COMPANY v. COMMONWEALTH.

June 13, 1918.

1. HAWKERS AND PEDDLERS—*Licenses—Bakers.*—Section 50 of the tax law of 1916 (4 Va. Code [Pollard], page 601), defining who should be considered peddlers, excepted from its provisions "those who sell or offer for sale, in person or by their employees, ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature, grown or produced by them and not purchased by them for sale."

   Held: That a corporation which did not purchase bread for sale, but produced and sold it at retail directly to householders and consumers in the city, both from its place of business and from its delivery wagons, was within the exception of the statute, as bread is a family supply of a perishable nature.

2. STATUTES—*Construction—Ejusdem Generis.*—The rule that where specific enumeration is followed by general words, the latter must be of the same kind as the former, usually called the doctrine of *ejusdem generis*, is only a rule of construction, and, as applied to statutes, intended to throw light on a statute of otherwise doubtful import, and has no application where the language of the statute plainly manifests a contrary purpose. In such case, the obvious intention of the legislature must be given effect rather than defeated by the misapplication of a rule, the conceded function of which is to elucidate what is obscure, and not to obscure that which is manifest.

3. STATUTES—*Construction—Ejusdem Generis.*—The *ejusdem generis* rule of construction does not obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning.

Error to an order of the Hustings Court of city of Richmond, subjecting plaintiff in error to a State peddler's license tax.

Reversed.

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The opinion states the case.

Scott & Buchanan, for the plaintiff in error.

J. D. Hank, Jr., Attorney-General, and *Leon M. Bazile, Assistant Attorney-General,* for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

The Corby Baking Company, Inc., by this writ of error, seeks relief from an order of the Hustings Court of the city of Richmond, subjecting it to a State peddler's license tax upon each of twenty-seven delivery wagons owned and used by it in connection with its business in that city.

The material facts are these: Plaintiff in error is a domestic corporation whose chief office and place of business is located in the city of Richmond. It does not purchase bread for sale, but produces and sells it at retail directly to householders and consumers in the city, both from its place of business and from its delivery wagons, each wagon being in charge of a driver who is an employee of the company.

Section 51 of the tax law of 1916 (4 Va. Code, p. 601) prescribes the license tax to be paid by various classes of peddlers, but the preceding section (section 50 of the tax law) defines who shall be considered a peddler; and by the terms of that section this case is to be decided. The contention of plaintiff in error is that its business falls within the exception contained in section 50, and consequently that the assessment was erroneous, and the taxes paid by it under protest should be refunded.

The part of section 50 applicable to the case reads as follows: "* * All persons who keep a regular place of business, open at all times in regular business hours and

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at the same place, and who shall elsewhere than at such regular place of business, personally or through their agents, offer for sale or sell, and at the time of such offering for sale deliver goods, wares and merchandise, shall also be deemed peddlers as above, *but this section shall not apply to those who sell or offer for sale, in person or by their employees, ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature, grown or produced by them and not purchased by them for sale.*" (Italics supplied.)

It is not denied that all bread disposed of by plaintiff in error, both from its place of business and supply wagons, sold and offered for sale by its employees, is produced by it and not purchased for sale. And it is equally true that bread is a family supply of a perishable nature. These conditions concurring satisfy the meaning of the exception as fully as if bread was expressly mentioned therein. It was manifestly the purpose of the legislature, in addition to the commodities named, to include in the exception without specification other family supplies of a perishable nature, grown or produced by the seller and not purchased by him for sale. Otherwise, this important paragraph composed of words of well understood signification, would have to be rejected as meaningless. That result is sought to be attained by application of the *ejusdem generis* rule. We are of opinion, however, that the doctrine invoked, if applicable at all to the circumstances of the case, ought not to be allowed controlling influence where the statute is expressed in language too plain to be misunderstood.

In *Commonwealth* v. *Werth*, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916D, 1263, it was held: "The rule that where specific enumeration is followed by general words, the latter must be of the same kind as the former, usually called

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the doctrine of *ejusdem generis*, is only a rule of construction, and, as applied to statutes, intended to throw light on a statute of otherwise doubtful import, and has no application where the language of the statute plainly manifests a contrary purpose. In such case, the obvious intention of the legislature must be given effect rather than defeated by the misapplication of a rule, the conceded function of which is to elucidate what is obscure, and not to obscure that which is manifest."

Again, it will be observed that the specifically enumerated articles are essentially diverse in character, and not of the same general class, and to such case the following principle applies: "Nor does the rule obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning." 26 Am. & Eng. Ency. L., p. 610; *McReynolds* v. *The People*, 230 Ill. 623, 633; 232 Mo. 49, 53.

Untrammeled by artificial rules of construction, there can be no doubt that the concluding words of the exception, "or other family supplies of a perishable nature, grown or produced by them and not purchased by them for sale," apply to and include bread produced and sold by plaintiff in error.

For these reasons, the order of the hustings court is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

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Wythville.

DARLING V. CITY OF NEWPORT NEWS.

June 13, 1918.

1. WATERS AND WATERCOURSES—*Pollution—Distinction Between Non-Navigable Stream and Tidal Navigable Bodies.*—There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its waters, so long as the owners of the land between low water and high water mark are not injured.
2. WATERS AND WATERCOURSES—*Pollution—Tidal Waters—Sewers—Municipal Corporations—Oysters—Damnum Absque Injuria.*—A municipal corporation situated on an arm of the sea, adjacent to tidal waters, has the right to use such waters for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is *damnum absque injuria.*
3. STATE—*Waters and Watercourses—Constitutional Law.*—The power of the sovereign State or nation is perpetual, not exhausted by one exercise, and all privileges granted in public waters are subject to that power, the exercise of which is not the taking of private property for public use, but only the lawful exercise of a governmental power for the common good.
4. STATUTES—*Construction—Grants in Derogation of Public Right.*—Grants in derogation of the common or public right are always

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strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication.

5. OYSTERS—*Leases—Construction of Statute—Rights of Planter.*—A lease under the Virginia oyster law is made only "for the purpose of planting and propagating oysters thereon," and it is for this purpose alone that the planter is authorized to use and occupy such ground—that is to say, that while any citizen might have taken oysters therefrom before the grant, afterwards he only may do so and all others are excluded from either planting or taking oysters from such ground during his term; this marks the limit of his right, for there is nothing to indicate that any other public or private right is withdrawn, limited or curtailed. He does not take a fee simple title, nor can he use the property for any other purpose except for that stated in the statute, and hence every other right heretofore in the public is preserved. Nor is there any language in the statute indicating any intent to destroy or impair any of the ancient rights of the riparian owners.

6. OYSTERS—*Leases—Construction of Statute—Rights of Planter.*—Under the Virginia statute (Acts 1910, chapter 343), as construed by the Supreme Court of Appeals the oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters, subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature; while another statute (Acts 1916, page 51) provides for the examination of such oyster-planting grounds so as to discover polluted areas, and prohibits the taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified and made suitable for human food.

Appeal from a decree of the Circuit Court of the city of Newport News. Decree for defendant. Complainant appeals.

Affirmed.

The opinion states the case.

Jones & Woodward and *J. Winston Read,* for the appellant.

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J. A. Massie, for the appellee.

PRENTIS, J., delivered the opinion of the court.

The appellant filed his bill against the appellee, basing his claim for relief upon the fact that he is the lessee from the State of very valuable oyster planting grounds located in Hampton Roads, on the northern side thereof near the city of Newport News, and that a considerable portion thereof has already been damaged and the oysters thereon polluted because of the sewer system of the city, which conducts sewage into Salter's creek and thence into the tidal waters of Hampton Roads, across appellant's oyster beds, and that other and greater damage therefrom is probable. To this bill the appellee filed a demurrer, which the lower court sustained because of opinion that the case of *Hampton* v. *Watson,* 119 Va. 95, 89 S. E. 81, L. R. A. 1916F, 189, is controlling upon the main question involved.

In this conclusion of the trial court we concur. The syllabus of that case fairly states the conclusions of this court as follows:

"1. There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the riparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its waters,

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permit the sale of oysters therefrom, and again in 1914, the United States health authorities made an examination and found that the waters were too polluted for oysters to be sold directly therefrom, and thereupon the Pure Food and Dairy Department of the State of Virginia notified the defendant in error, among others, that it would not be permitted to sell their oysters without first transplanting them to unpolluted waters."

In that case the plaintiff's right to maintain his action necessarily depended upon his having had an exclusive private right of ownership—an exclusive private right of fishery—in the tidal waters and bed thereof in question as of the time his alleged cause of action arose. Plainly under the facts of that case he did not have such exclusive private property right at the time his alleged cause of action arose, since the city of Hampton, by its sewer system established and begun in operation in 1899-1900 and enlarged in 1908, certainly by 1914 (five years having expired after the injury therefrom began), had acquired a statutory right to discharge its sewerage in the locality in question. *Virginia Hot Springs Co.* v. *McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179; *Southern Ry. Co.* v. *McMenamin*, 113 Va. 121, 75 S. E. 980; *Magruder* v. *Virginia Carolina Chemical Co.*, 120 Va. 352, 91 S. E. 121. The *Hampton* v. *Watson* case, therefore, presented the question whether a plaintiff claiming an exclusive private right of fishery under grant (lease) from the Commonwealth which he had lost, by reason of the bar of the statute of limitations, before he instituted his action, because of public use in conflict with such private right, could yet maintain his action. That was a very different question from the one presented in the instant case, where the appellant held and owned at the time his alleged cause of action arose an exclusive private right of fishery under grant (lease) from the Commonwealth which he had not lost before he instituted his action.

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What is said, therefore, in the *Hampton* v. *Watson* case should be construed in the light of the facts of that case.

Moreover, as said in *Williams Printing Co.* v. *Saunders*, 113 Va. 156, at p. 179, 73 S. E. 472, at p. 478 (Ann. Cas. 1916 E. 693):" * * * the value of a case as a precedent is affected by the consideration that the precise point for which it is relied upon as authority was presented in argument and considered by the court." It seems that in the *Hampton* v. *Watson* case the point was not presented in argument that by the provision of section 58 of the Constitution of Virginia of 1902, the authority of the legislature to authorize a municipality to *damage* private property for public use without just compensation was taken away, so that the *damnum absque injuria* rule applied by the court in that case should not have been applied. Certainly, that point was not considered by the court, as appears from the opinion. Therefore, for this reason also, the *Hampton* v. *Watson* case should not be considered as decisive of the instant case. But if that case can be construed to apply to the instant case, it can only be upon the ground that it holds that an exclusive private right of fishery cannot be granted by the Commonwealth. Such a holding would be unsound because in conflict with the principle of law involved and the settled law on the subject, as above noted. Hence, I am of opinion that the *Hampton* v. *Watson* case cannot properly rule the instant case.

In *Seaman* v. *New York, supra*, the plaintiff had no property right which he had acquired of the Commonwealth in the tidal water in question, nor in the bed thereof.

In *Sayre* v. *Newark, supra*, there was no private property right in the bed of the stream acquired from the Commonwealth nor was there any "taking" of the property right in question. It was merely a riparian property right which was "damaged." The Constitution of New Jersey contains no provision against private property being "damaged" for

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public use without just compensation, but only such provision as to a "taking" of private property for public use. In New Jersey the construction of the latter provision by its courts is the same as the Virginia doctrine on that subject before our Constitution of 1902. Hence that case is not authority in point on the question under consideration under the latter Constitution.

In *Doremus* v. *Paterson, supra,* the stream affected by the pollution was above tidewater, and the plaintiff had acquired no property right in the water in question.

In *Merrifield* v. *City of Worcester, supra,* the property right affected was a riparian right only, not a right in the bed of the stream. The court remarked that it was not an "acquired property right in possession." However, that case is to some extent distinguished by a holding of the court somewhat peculiar to Massachusetts (1 Furnham on Waters, sec. 138-c); and, further, it rests upon an application of the doctrine of *damnum absque injuria* which has not been sanctioned in Virginia. *Arminius Chem. Co.* v. *Landrum,* 113 Va. 7, 73 S. E. 459, 38 L. R. A. (N. S.) 272, Ann. Cas. 1913 D. 1075.

In *Haskell* v. *Bedford, supra,* among the plaintiff's property rights was one which he had acquired from the Commonwealth, and that was a title to the channel of the river underneath tidewater, by virtue of a certain statute of the State of Massachusetts. As to that right the court in its opinion says: "But the right conferred upon the city of New Bedford to lay out common sewers 'through any streets or private lands' does not include the right to create a nuisance, public or private, upon the property of the Commonwealth, or of an individual, within tidewater. *Hale de Mortibus Maris,* c. 7, in Hargr. Law Tracts, 85; *Boston* v. *Richardson,* 19 How. 263, 270, 15 L. Ed. 639, and 24 How. 188, 193, 16 L. Ed. 625; *Proprietors of Docks & Canals* v. *Lowell,* 7 Gray (Mass.) 223; *Sherman* v. *Tobey,* 3 Allen

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(Mass.) 7; *Attorney-General* v. *Birmingham*, 4 Kay & Johns, 528; *Attorney-General* v. *Leeds*, Law Rep., 5 Ch. 583." And the court held that the city, notwithstanding its legislative authority to establish its sewers as it did, discharging into the bed of the channel of the said river, was liable in damages to the plaintiff for the injury done him by the accumulation of sewerage in such river bed below tidewater, and filling it up, that being a private nuisance, and reversed the court below on this point for holding to the contrary. See pp. 214, 215 and 216 of the report of that case in 108 Mass. Indeed the court in that case went farther and held that, "Against the continuance of such a nuisance, if clearly proved, equity will also grant relief by injunction," citing a number of cases. See 108 Mass. p. 216.

In *Grey* v. *Paterson, supra*, the plaintiffs at whose relation the suit was brought were riparian owners, and those whose lands bordered on the river at tidewater had acquired no property right in the tidal waters or beds thereof, such right still remained in the Commonwealth.

There is nothing in the cases of *Taylor* v. *Commonwealth*, 102 Va. 768, 47 S. E. 875, 102 Am. St. Rep. 865; *N. N. S. B. & D. D. Co.* v. *Jones*, 105 Va. 503, 54 S. E. 314, 6 L. R. A. (N. S.) 247; *Ill. Cent. R. Co.* v. *Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, or *Coxe* v. *State*, 144 N. Y. 396, 39 N. E. 400, cited in the opinion of this court in *Hampton* v. *Watson, supra*, which is in any way in conflict with the holding in the case of *Huffmire* v. *Brooklyn, supra*.

It is true that in the opinion in the case of *Coxe* v. *State* just mentioned, there is a distinction sought to be made between the character of the title vested in the Commonwealth with respect to tidal navigable waters and the beds thereof and the character of such title with respect to land above tidewater. But for the reasons indicated above, both on principle and upon authority, such a distinction cannot be

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sound. The opinion confuses the character of title vested in the Crown in England with that vested in our American Commonwealths and attributes to the latter limitations which in truth have and can have no existence unless imposed by Constitution, State or Federal. A detailed discussion of the authorities referred to in such case would make this even more manifest, but that would needlessly prolong this opinion, since what is said in *Coxe* v. *State* on the subject under consideration does not contravene the power of the legislature to grant an exclusive private right of fishery which does not interfere with the powers vested in the Federal government under the Federal Constitution to control navigation and regulate commerce. Such a grant even under the position taken in that case would be considered a reasonable exercise by the State of its legislative power and valid to vest exclusive private right of fishery, and hence such case is not in conflict with the case of *Huffmire* v. *Brooklyn, supra.*

What the case of *Coxe* v. *State, supra,* decided was that a legislative grant to a private individual or corporation to dyke off a part of the tidal navigable salt waters and fill in so as to reclaim the beds underneath such waters was void because in conflict with the Federal Constitution granting to the Federal government the exclusive power to regulate foreign and domestic commerce. There is nothing in that holding in conflict with either the *Huffmire* v. *Brooklyn* case or what has been said above on the fundamental principle involved.

That case also rests its decision on the ground that the act of the legislature in question was void under the New York State Constitution because it embraced more than one subject; but that ground is, of course, foreign to the subject we have under consideration and is merely referred to as further showing that the court did not rest its decision of the case upon the distinction sought to be made in

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its opinion as aforesaid with respect to the character of title vested in the Comonwealth to tidal navigable waters and the beds thereof.

There is nothing in the cases of *Scranton* v. *Wheeler*, *Greenleaf Johnson Lumber Co.* v. *Garrison*, *Willink* v. *United States*, or *State* v. *Cleveland*, cited in the majority opinion, in conflict with what has been said above. These cases concern the power of the Federal government under the Federal Constitution. They hold, in effect, that no private property right in navigable waters and the beds thereof can be acquired or held as against the power of the Federal government to control navigation and regulate commerce, conferred upon the latter by the Federal Constitution.

I have no difference with the majority opinion on the subject that, as stated in such opinion, "Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is specifically granted, or by necessary implication." *Illinois R. Co.* v. *Illinois*, 146 U. S. 469, 13 Sup. Ct. 110, 36 L. Ed. 1048, cited in the majority opinion, and numerous other authorities which might be cited, so holding in effect. But after giving full force and effect to this rule, as we have seen from a consideration of the Virginia statute law on the subject, such statute law is free from all ambiguity and all uncertainty, and plainly and unquestionably has made the grant to the appellant of the exclusive rights of fishery aforesaid, in the locality aforesaid, "for the purpose of planting and propagating oysters thereon." And such grant was accepted by the appellant and he entered into the possession thereof before the appellee acquired any rights under the legislative grant of authority to it as a municipality to construct its new sewerage system and to discharge its sewerage therefrom, complained of by appellant. The circumstance that the fee simple was not granted to the appellant seems to me to be wholly immaterial. Other

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property rights are just as sacred, may be of the same value and are just as much entitled to protection as are the simple interests in property. The point is that exclusive private property rights were "specifically" granted to and derived by the appellant under legislative enactments of the Commonwealth of Virginia; and such rights were so acquired by the appellant before any conflicting rights were acquired by the appellee under its legislative authority. The new sewer and the discharge of sewerage therefrom complained of by appellant, was not begun by appellee until 1907, after the Constitution of Virginia of 1902 went into effect. If prior to such Constitution the appellee had any legislative authority to discharge its sewerage to the damage of said private rights of appellant without liability to him in damages, such authority was annulled by the provision of such Constitution (sec. 58) above referred to. *Swift & Co.* v. *Newport News, supra,* 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404, and other authorities cited above on this subject. Hence in 1907 and thereafter, when the appellee committed the acts complained of, creating what would be a private nuisance if created by an individual, the appellant's private property rights aforesaid were protected by such constitutional provisions, and the legislative authority relied on by appellee could furnish no warrant to damage such property rights as aforesaid, and no shield to it from liability for damages therefor. The majority opinion refers to certain authorities on the subject of the rights of riparian owners of real estate bordering upon navigable waters. I have no difference with those authorities. The rights of such riparian owners exist at common law and under statute. Such rights are well settled by the authorities, and it is firmly established that such rights, unless derived from legislative authority, never extend beyond the low water mark into navigable tidal salt waters, or upon the beds thereof. The right to build wharves extending beyond

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the low water mark of navigable tidal salt waters must be derived from legislative grant. *Taylor* v. *Commonwealth*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; *Newport News S. Co.* v. *Jones*, 105 Va. 503, 509, 54 S. E. 314, 6 L. R. A. (N. S.) 247. Hence, the alleged right of a municipality, relied on by appellee in the instant case, to discharge its sewerage into the waters aforesaid and upon the beds thereof are not the rights of a riparian owner, and the authorities referred to in the majority opinion on this subject have no bearing in principle or controlling application to the instant case, as I must say, with all due deference.

My view is that the right of the appellee on which it relies in this case can be nowhere found unless under its legislative authority; and, as above stated, it cannot be found under that authority.

The remaining authorities cited in the majority opinion, not referred to above, of note to case of *Winchell* v. *Waukesha*, 84 Am. St. Rep. 921-3, and 9 R. C. L. 682, confirm the correctness of the conclusion of this dissenting opinion. There is nothing in the act of assembly of 1908, p. 624, referred to in the majority opinion, to the contrary. Indeed, the latter act expressly provides that the municipality shall "acquire" the land necessary to operate its sewers "by purchase, condemnation, or otherwise," and does not contemplate the damaging of any private property rights without due compensation.

Hence, upon principle and upon authority, I think the appellee, upon the case made by the allegations of the bill, is liable in damages to the appellant to the extent of the just compensation required to be paid by section 58 of the Constitution of Virginia, 1902.

The learned judge of the court below would have so held, as appears from the decree appealed from, but for the supposed binding authority to the contrary of the case of *Hampton* v. *Watson*, *supra*. For the reasons stated above.

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I do not consider the latter case authority to the contrary. And if it were, I am convinced that upon principle and authority, as aforesaid, it should be overruled.

It is not intended by anything which is said above to intimate that I think an injunction should be granted in the instant case. The granting or refusal of an injunction would depend upon other considerations.

Where a municipal corporation has at great expense constructed and put in operation, and used for a long time, a system of sewerage, an injunction should be refused on the ground that it would be inequitable to give such relief, where relief can be otherwise afforded, as by making just compensation in damages. *Grey* v. *Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. Many other authorities might be cited to the same effect.

For the reasons stated above, I am constrained to dissent from the majority opinion.

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Wythville.

DREYFUS AND COMPANY, INC., v. WOOTERS.

June 13, 1918.

Absent, Burks, J.

1. FELLOW SERVANTS—*Porter and Clerk—Case at Bar.*—A porter in a store, in pursuance of his usual work, washed the windows and mopped the floor of the vestibule, and as the temperature was unusually low, a small quantity of water froze on the floor of the vestibule. A clerk, who was late in reaching her work and was in a hurry, as she entered the vestibule of the store, slipped and fell upon the ice and injured her right shoulder. For this injury the clerk brought an action against her master, the proprietor of the store.

   Held: That the porter, while in the performance of his ordinary duties under the general directions of his master, was a fellow servant of the plaintiff.

2. FELLOW SERVANTS—*Instructions—Case at Bar.*—In the instant case, there was no original defect in the vestibule, but the ice which had suddenly accumulated created the danger, and this danger, according to the evidence of the defendant, had just been created solely because the porter had allowed the water to remain and freeze. If then the jury credited the evidence submitted by the defendant on this point, it would have been clearly their duty to find for the defendant. The refusal of the court thus to instruct them was, therefore, prejudicial.

3. MASTER AND SERVANT—*Safe Place to Work—Fellow Servants.*—The rule requiring the master to exercise proper care to provide a reasonably safe place for his employees does not require the master to exercise constant vigilance and supervision over the routine duties of his servants. If such place suddenly becomes unsafe by reason of some negligence of one servant and his fellow servant is thereby injured, the master is not responsible unless within a reasonable time after notice that such place has become unsafe, the master fails to remove the danger.

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4. DAMAGES—*Master and Servant—Injury to Servant—Medical Expenses.*—In an action by a servant against her master for injury, the plaintiff, if entitled to recover, is unquestionably entitled to have the jury consider the amount of medical expenses incurred in consequence of her injury, but as the aggregate of those expenses were entirely within the knowledge of her physicians and herself, the jury should not have been instructed to allow for such expenses claimed in the declaration, in the absence of evidence from which they might with some degree of certainty ascertain the amount thereof. Where a plaintiff expects to recover therefor, they should be established by reasonable and proper proof.
5. DAMAGES—*Instructions.*—In an action against a master for injuries to a servant, an instruction that the plaintiff might recover "all damages which the evidence shows she has sustained," is objectionable where the previous clauses of the instruction had fully covered her mental and physical pain, pecuniary loss and every element of damage claimed in the declaration.
6. EXPERT AND OPINION EVIDENCE—*General Effects of an Ailment.*—Where a physician had testified that the plaintiff had a chronic case of brachial neuritis, there is no legal objection to having him describe the general effects of the ailment, including the suffering which usually follows such a condition.

Error to a judgment of the Hustings Court, Part II, of city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

R. H. Talley, for the plaintiff in error.

O'Flaherty & O'Flaherty, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

Katie Wooters, hereinafter called the plaintiff, recovered a judgment of Dreyfus and Company, Incorporated, here-

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inafter called the defendant, in an action for personal injury, and the defendant is here assigning several errors in the proceedings.

The conceded facts are: That the plaintiff was one of twenty-five or more clerks employed by the defendant at its store in Richmond, and on the morning of February 13, 1917, when she was late reaching her work and in a hurry, she entered the vestibule of the store, slipped and fell upon ice which had recently accumulated in the vestibule just in front of the door, and injured her right shoulder. The porter in the store, in pursuance of his usual work, had that morning washed the windows and moped the floor of the vestibule, and as the temperature was unusually low for this section—that is, about ten degrees above zero—a small quantity of water had frozen in the vestibule and caused the accident.

The theory of the plaintiff is that the porter was performing a non-assignable duty of the defendant to exercise ordinary care to provide a reasonably safe place for its employees, and hence, in any event, that it is responsible for the negligence alleged; and in addition to this that the porter in performing his work on that morning was acting under the direct supervision and specific orders of the assistant manager of the store, representing the defendant.

The defendant's theory of the case is that it had not been guilty of any negligence; that the plaintiff was guilty of contributory negligence in not observing the ice; and that if there was any other negligence it was that of the porter, a fellow-servant of the plaintiff, and that therefore there can be no recovery.

There was evidence tending to establish each of these opposing theories. Among the errors assigned is the refusal of the court to give the following instruction: "The court instructs the jury that all employees serving a common employer, working under the same control, deriving

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compensation and authority from the same source, and engaged in the same general business, although in different grades or departments, are fellow-servants, and take the risk of each other's negligence. And if the jury believe from the evidence that the injury to the plaintiff was caused by the negligent act of a fellow-servant, then the plaintiff is not entitled to recover and you should find for the defendant, unless you further believe from the evidence that the employer failed to use due care to provide a reasonably safe place for the use of the plaintiff."

It is manifest to us that this constitutes harmful error. There can be no doubt that the porter while in the performance of his ordinary duties under general directions of the defendant was a fellow servant of the plaintiff, and that the defendant, under the evidence introduced, was clearly entitled to have the jury properly instructed upon the question thus presented. The floor of the vestibule was of tiling, which was perfectly safe under ordinary conditions, and on this morning, although a number of people had passed over it, no one else was injured. The rule requiring the master to exercise proper care to provide a reasonably safe place for his employees does not require the master to exercise constant vigilance and supervision over the routine duties of his servants. If such place suddenly becomes unsafe by reason of some negligence of one servant and his fellow servant is thereby injured, the master is not responsible unless within a reasonable time after notice that such place has become unsafe, the master fails to remove the danger. That the vestibule was absolutely safe before the accumulation of the ice is clear.

In *Richmond Locomotive Works* v. *Ford*, 94 Va. 628, 27 S. E. 509, this is held: "It is the duty of the master to furnish and maintain a reasonably safe place in which the servant is to work, and this duty is personal to the master. But if the place is reasonably safe in the first instance, and

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is afterwards rendered unsafe by the negligent manner in which the boss or foreman of a gang of hands directs the work to be done, in doing which an injury is inflicted, the master is not liable for such injury." *Trigg* v. *Lindsay*, 101 Va. 193, 43 S. E. 349; *Norfolk & Western Ry. Co.* v. *Houchins*, 95 Va. 398, 28 S. E. 578, 46 L. R. A. 359, 64 Am. St. Rep. 791; *Russell Creek Coal Co.* v. *Wells*, 96 Va. 416, 31 S. E. 614; *Southern Ry. Co.* v. *Mausey*, 98 Va. 692, 37 S. E. 285; *Southern Ry. Co.* v. *Smith*, 107 Va. 553, 59 S. E. 372; *Reid* v. *Medley*, 118 Va. 462, 87 S. E. 616.

In *Burke* v. *National India Rubber Co.*, 24 R. I. 446, 44 Atl. 307, the facts were, that the plaintiff was employed in the mill of the defendant, and two or three hours before the accident complained that certain other employees of the defendant, in the course of their employment, had thrown grease upon the floor of the room through which it was necessary for the plaintiff to pass. The plaintiff slipped on the grease and fell against some of the machinery and suffered injury. It was there held that the cleaning up of floors of manufactories is a part of the duty of the servant rather than of the master, and if such work is not properly done and an accident results to a servant in consequence of the absence of notice to the master of the conditions, the negligence is that of a fellow servant, provided both were engaged in a common employment. This duty is distinguishable from that of the master to furnish reasonably safe premises for the use of its servants. It was further held, that two or three hours was too short an interval of time to charge the master with notice of the unsafe condition of the premises caused by that negligence, it appearing that the premises, except for such negligence, were reasonably safe.

So, here there was no original defect in the vestibule, but the ice which had suddenly accumulated created the danger, and this danger, according to the evidence of the defendant,

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had just been created solely because the porter had allowed the water to remain and freeze. If then the jury credited the evidence submitted by the defendant on this point, it would have been clearly their duty to find for the defendant. The refusal of the court thus to instruct them was, therefore, prejudicial. *Peele* v. *Bright*, 119 Va. 182, 89 S. E. 238.

Another error alleged is in instruction No. 5, which was granted by the court at the instance of the plaintiff. That instruction told the jury, among other things, that they might allow "also any sums of money which she may have paid or will be obligated to pay for doctors' bills, medicines, etc., in and about being cured of her said injuries, and all damages which the evidence shows she has sustained * * *"

The plaintiff had introduced the evidence of three physicians who had attended her and given her treatment, but had not proved what the expense of such treatment had been, except as to one payment of $10.00. The plaintiff, if entitled to recover, was unquestionably entitled to have the jury consider the amount of medical expenses incurred in consequence of her injury, but the aggregate of those expenses were entirely within the knowledge of her physicians and herself, and the jury should not have been instructed to allow for such expenses claimed in the declaration, in the absence of evidence from which they might with some degree of certainty ascertain the amount thereof. In this case the jury could only speculate as to the amount of these expenses, with the exception above mentioned. Where a plaintiff expects to recover therefor, they should be established by reasonable and proper proof. The general clause, that she might recover "all damages which the evidence shows she has sustained," is also objectionable because the previous clauses of the instruction had fully covered her mental and physical pain, pecuniary loss and every element of damage claimed in the declaration.

The only other assignment of error which we deem it

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necessary to notice, is an objection to the testimony of Dr. J. T. McKinney, a witness for the plaintiff, as to the extreme suffering which comes from a case of brachial neuritis. The physician had testified that the plaintiff had a chronic case of brachial neuritis, and there is no legal objection, under such circumstances, to having the doctor describe the general effects of the ailment, including the suffering which usually follows such a condition; and this is in effect all the witness testified to on this point. There is no merit in this assignment.

It is clear to us that for the error in refusing to instruct the jury, in effect, that if the proximate cause of the accident was the negligence of the porter, the plaintiff could not recover, the judgment must be reversed.

Reversed.

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Wytheville.

E. I. DUPONT DE NEMOURS AND COMPANY v. WILLIAM B. HIPP.

June 13, 1918.

Absent, Burks, J.

1. MASTER AND SERVANT—*Assumption of Risk—Knowledge of Servant.*—An employee who knows of the unsafe condition of the place in which he is working, or who by the exercise of ordinary care might know the same, is not compelled to continue his work, but if he does so continue it in such place, under such conditions, he assumes such risks as are ordinarily incident to the service in which he is engaged, and also such risks as become known to him during the progress of the work, or which might have been ascertained by him in the exercise of ordinary care.
2. MASTER AND SERVANT—*Duty of Master to Warn Servant—Visible Dangers—Safe Place to Work.*—The master is not under an obligation to warn an adult servant of sound mind of the existence of dangers that are visible to men of ordinary intelligence, and has the right to assume, in the absence of evidence to the contrary, that his servant has ordinary intelligence and capacity, and is possessed with the instinct of self-preservation; and the general rule that the master must exercise ordinary care to provide his servant with a place reasonably safe in which to work does not apply to a place which is constantly changing by reason of the work then being done, nor does it apply where the very work which the servant is employed to do consists in making a dangerous place safe.
3. MASTER AND SERVANT—*Safe Place to Work—Appliances Prepared by Servant Himself—Case at Bar.*—In the instant case the scaffold upon which the plaintiff, a carpenter, was working was devised by him, was under his control, and was in itself a place of extreme danger, and the rule requiring the master to provide a reasonably safe place in which the servant

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is to work can have little application to such a situation, unless the master has himself constructed the place and directed the servant to use it. It differs from the permanent place required to be furnished in a mill or a factory, or where the place, the machinery, or other appliances with which the servant is employed to work are furnished by the master. When the place at which the work is to be done, or the temporary appliances for doing the same, are prepared by the servant himself, a different rule applies, and the duty of the master is performed when he supplies his servant with the proper materials with which to construct such appliances.

4. MASTER AND SERVANT—*Safe Place to Work—Appliances Prepared by Servant Himself—Case at Bar.*—In the instant case it was a part of the plaintiff's, a carpenter's duty, for his own protection, to keep the scaffold safe as well as to make it so. He must be held to the knowledge that, with other workmen there and suspended as it was, the danger of a fall might at any time become imminent. Every such service has its peculiar hazards, and this particular service, that is, the moving of this swinging scaffold, had in it elements of extreme peril to the plaintiff, which at all times demanded extreme caution, prudence and foresight on his own part to avoid just such an accident as occurred.

5. MASTER AND SERVANT—*Injury to Servant—Moving Scaffold—Assumption of Risk—Case at Bar.*—Plaintiff, an experienced carpenter, was engaged in roofing, fastening metal sheets on a roof from the under side, standing on a scaffold or platform. The scaffold rested on two steel rods. These rods had been freshly painted, and plaintiff was injured by a fall occasioned by one end of the scaffold slipping from the rod which supported it, when he was preparing to move the same. Plaintiff had been directed by his foreman to work upon the scaffold notwithstanding that the paint was wet.

Held: That the master was not liable.

6. MASTER AND SERVANT—*Injury to Servant—Moving Scaffold—Assumption of Risk—Case at Bar.*—The accident, if caused by the wet paint, was most unusual, and proper care does not require the anticipation of unusual events or make an employer an insurer against all accidents. To make the employer responsible there must be negligence, and negligence is the doing or failing to do some act which a person of ordinary prudence could forsee would naturally and probably cause the injury complained of. If on the one hand it is assumed, as in fairness it must be, that the plaintiff, with his knowledge and experience, did not realize that the risk was

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increased by the fresh paint, it must also be assumed that the defendant did not realize such increased danger, if any. If, on the other hand, the view is taken which was urged for the plaintiff, that the defendant must be charged with knowledge of such increased risk, then it must also be concluded that the plaintiff also knew of it, and in that event it follows inevitably that he assumed that risk.

7. MASTER AND SERVANT—*Assumption of Risk—Instructions.*—In an action by a servant against his master for injuries sustained by the servant in the course of his employment, it is reversible error, where the defense was the assumption of risk by the servant, for the trial court, upon the request of defendant, to refuse instructions on the assumption of risk.

8. MASTER AND SERVANT—*Assumption of Risk—Instructions.*—In an action by a servant against his master for injuries sustained by the servant in the course of his employment, it is reversible error, where the defense was the assumption of risk by the servant, for the trial court to give a series of instructions directing a verdict for the plaintiff, if defendant was guilty of negligence, where each of the instructions entirely ignored the defense of assumption of risk.

Error to a judgment of the Circuit Court of Prince George county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Plummer & Bohannan, for the plaintiff in error.

Lassiter & Drewry, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

William B. Hipp was seriously injured by a fall from a scaffold while working on a building which was being constructed by the E. I. DuPont de Nemours and Company at its plant in Prince George county, and brought this action alleging that his injury was due to the negligence of the

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company. There have been two trials. Upon the first there was a verdict for the plaintiff, which the trial court set aside; upon the second there was another verdict for the plaintiff, upon which the trial court entered judgment. The defendant is here alleging several errors on the second trial.

The material facts, giving the plaintiff the benefit of the most favorable interpretation of the evidence, and omitting all reference to the conflicting evidence introduced by the defendant, may be thus stated. The plaintiff was a man about thirty-five years of age, a master carpenter of some fourteen years experience, something of an athlete, and regarded as a skilful and valuable man. He had been working at the plant for about eleven months before the accident. During that period he had worked on six buildings of the same kind as that on which he was working at the time of his injury, and he had done work similar to that which he was performing at the time of the accident on the roofs of three of such buildings. The house upon which he was then at work was known as "Purification Building No. 6," a large steel frame building, ninety feet high to the comb of the roof. The plans provided for a shed roof with a comparatively gentle slope on the sides, while in the center it was to be covered with an "A" roof, higher than the shed roof and of much steeper slope. The work assigned to him was the fastening of the metal sheets on this "A" roof from the under side, while on a scaffold or platform, and it was done thus: Two men on the top of the building placed the metal sheets of roofing in position and thrust pieces of soft wire through them, and it was the duty of the plaintiff and his fellow laborer on the scaffold to twist the wires in such a way as to fasten these sheets to the metal framework of the building. The scaffold, which was built, not by the company, but by Hipp and his fellow laborer, consisted of a top timber 2 x 4 inches, 10 or 12 feet long, resting on two

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steel rods five-eighths of an inch in diameter which were about eight feet apart, which rods connected and held the two top purlins, and a bottom timber 4 x 6 inches, about 16 feet long, was swung therefrom and held by two loops of spliced rope. The bottom timber was supported at three points, namely, by the two loops of rope and by one of the girders running at right angles with the timbers; and there were two boards, each 9 or 10 feet long, which rested on the bottom timber of the scaffold and extended at right angles therewith to the side plates of the building. These boards were used by Hipp and his associate to pass from under the apex to the base of the "A" part of the roof so as to fasten the wires in their proper places. It is admitted that the scaffold was properly constructed, both as to materials and workmanship, and that it had been used with safety in other buildings as well as in that building up to the time of the accident.

On November 29, 1915, while Hipp and his associate were thus at work, they were directed to leave that particular place so that the painters could paint there. This painting was finished on the next morning, and immediately after the midday meal Hipp was directed by his foreman, Stillwell, to go back on the scaffold and continue the work which had been suspended on the previous day. Hipp made some objection to returning to work at that place while the paint was still wet; he did not, however, suggest that this constituted any source of danger, but only that it was cold and that he did not want to go on the scaffold and get the paint on him. He was told by the foreman that it was necessary to do so because his superior officer was "rushing the job." Raymond Winner then went with Hipp to work on the scaffold. They had put on several pieces of roofing and finished all that part of the roof immediately above the scaffold. It then became necessary, in order to continue their work, to move the scaffold to a new location by slipping it about

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eight feet horizontially along under the apex of the roof to the next uncovered portion thereof, and again to suspend it from other similar steel rods about eight feet apart. Hipp had frequently done this, and his method of doing it was first to remove the boards which extended from the bottom timber of the scaffold to the side plates of the building, and then to fasten a long rope around one end of the upper timber and, with the assistance of the men on top of the roof, to slip the scaffold to its new location while one of the men below held the other end of the rope to prevent it from falling, this rope being passed from the end of the upper timber of the scaffold over a portion of the upper structural steel work of the building and down to the man below who stood on one of the girders. Proceeding with this, Hipp directed Winner to go after the rope which was beyond the next girder. Winner obeyed and at the same time Hipp started to walk towards the far end of the scaffold so as to catch the rope when it should be thrown to him by Winner, intending then to pass it around the far end of the upper timber in the usual way. At this time and before Hipp had reached the other end of the scaffold, the upper timber began to slip towards him and finding that he could not get to a place of safety in time, and that the end of the upper timber was about to slip off of one of the iron rods, Hipp having on gloves reached for and grasped the rod. The upper timber slipped off at that end, and as he was unable to hold his grasp he fell. While falling he threw himself into a steel tank about forty-five feet below, thus saving himself from a fall to the bottom floor ninety feet below.

The sole negligence relied upon is that he was directed by his foreman to return to his work while the paint upon the steel rods upon which the upper timber rested was fresh and wet. One of the several defenses relied upon was that the plaintiff could not recover because he had assumed the risk of such an accident.

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This principle has been much discussed and many authorities are cited in the briefs. The doctrine which appears to be perfectly well settled, has been fairly stated in this language: An employee who knows of the unsafe condition of the place in which he is working, or who by the exercise of ordinary care might know the same, is not compelled to continue his work, but if he does so continue it in such place, under such conditions, he assumes such risks as are ordinarily incident to the service in which he is engaged, and also such risks as become known to him during the progress of the work, or which might have been ascertained by him in the exercise of ordinary care. *Virginia Portland Cement Co.* v. *Luck*, 103 Va. 432, 49 S. E. 577; *Reid* v. *Medley*, 118 Va. 462, 87 S. E. 616; *Riddley* v. *Clinchfield Coal Corp.*, 119 Va. 739, 89 S. E. 926; *Lynchburg Foundry Co.* v. *Dalton*, 121 Va. 480, 93 S. E. 587; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

The master is not under an obligation to warn an adult servant of sound mind of the existence of dangers that are visible to men of ordinary intelligence, and has the right to assume, in the absence of evidence to the contrary, that his servant has ordinary intelligence and capacity, and is possessed with the instinct of self-preservation; and the general rule that the master must exercise ordinary care to provide his servant with a place reasonably safe in which to work does not apply to a place which is constantly changing by reason of the work then being done, nor does it apply where the very work which the servant is employed to do consists in making a dangerous place safe. *Jacoby Co.* v. *Williams*, 110 Va. 55, 65 S. E. 491; *Clinchfield Coal Corp.* v. *Cruise*, 117 Va. 645, 86 S. E. 135.

The scaffold upon which this plaintiff was working was devised by him, was under his control, and was in itself a place of extreme danger, and the rule requiring the master to provide a reasonably safe place in which the

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servant is to work can have little application to such a situation, unless the master has himself constructed the place and directed the servant to use it. It differs from the permanent place required to be furnished in a mill or a factory, or where the place, the machinery, or other appliances with which the servant is employed to work are furnished by the master. When the place at which the work is to be done or the temporary appliances for doing the same are prepared by the servant himself, a different rule applies, and the duty of the master is performed when he supplies his servant with the proper materials with which to construct such appliances.

In 2 Labatt on Master and Servant, section 614, it is said: "If the master supplies suitable material for the construction of an appliance which he is not obliged, and has not undertaken, to furnish in a completed state, and the workmen themselves construct it according to their own judgment, the master is not liable for the manner in which they used the materials thus supplied." Notes 54 L. R. A. 143.

The master cannot be held liable, under the rule requiring him to furnish a safe place for the servant, when the very work which the servant is doing consists in making safe the place which he alleges to have been in an unsafe condition. *Bedford Belt R. Co.* v. *Brown*, 142 Ind. 659, 42 N. E. 359.

"The rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment either express or implied, the employees are to adjust the appliances by which the work is to be done." *Callan* v. *Bull*, 113 Cal. 593, 45 Pac. 1017.

The assumed risk doctrine has been applied in many cases, so as to exonerate the master from liability for injury to a servant from defects in temporary scaffolds or stagings constructed by a fellow servant in the progress of the general work in which they were engaged, and as a

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means in the accomplishment of that work. Note 3 L. R. A. (N. S.) 501; Shearman and Redfield on Neg. (6th ed.), section 195; 26 Cyc. 1115.

"The obligation of an employer to furnish his employees with safe appliances and a safe place of work does not impose upon him the duty of supplying instrumentalities in a completed form. Where, under the terms of the contract of employment, the employees are required to construct an instrumentality, the employer's duty is discharged by furnishing suitable materials with which it may be constructed; and he is not liable for an injury due to a defect in its construction or adjustment. This frequently has been held in the case of scaffolds, staging, derricks, and like instrumentalities." 18 R. C. L. 596, citing many authorities. 26 Cyc. 1115.

One general rule is thus stated in *Studebaker* v. *Shelby Steel Tube Co.*, 18 Ann. Cas. 613: "Where an employer does not himself undertake the duty of furnishing the staging as a structure, but merely supplies suitable materials and competent labor by which it may be built and from time to time adapted to the work, and the duty of furnishing or adapting the staging as an appliance for use is intrusted to or assumed by the workmen themselves, within the scope of their employment, the employer is not answerable to one of the workmen for the negligence of a fellow workman in the construction of the scaffolding whereby it falls and injures him."

It was a part of the plaintiff's duty, for his own protection, to keep the scaffold safe as well as to make it so. He must be held to the knowledge that, with other workmen there and suspended as it was, the danger of a fall might at any time become imminent. Every such service has its peculiar hazards, and this particular service, that is, the moving of this swinging scaffold, had in it elements of

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extreme peril to the plaintiff, which at all times demanded extreme caution, prudence and foresight on his own part to avoid just such an accident as occurred. *Leishman* v. *Union Iron Works*, 3 L. R. A. (N. S.) 500.

The court gave the jury twenty instructions. One of them referred to the assumption of risk doctrine, but did not clearly instruct the jury that if the evidence showed that the plaintiff assumed the risk he could not recover, although the defendant offered three instructions covering this phase of the case. These instructions, Nos. 7, 12 and 13, are as follows:

"7. The court instructs the jury that an employee who knows the unsafe conditions of a place in which he is working, or who by the exercise of ordinary care might know the same, is not compelled to continue his work, but if he does go on with his work in such place under such conditions, he assumes such risks as are ordinarily incident to the service in which he is engaged, and also such risks as become known to him during the progress of the work, or which might have been ascertained by him by the exercise of ordinary care."

"12. The court instructs the jury that if they believe from the evidence that the plaintiff had been working on that part of the building where the injury occurred, that in the meanwhile the interior framework of the building had been freshly painted, and that the rods on which the scaffold is alleged to have rested were slippery from the paint, that he knew, or that he was charged with the knowledge, of the danger of using such scaffold under such conditions, and that while the plaintiff was working on the scaffold, or while he was preparing to move the same, the scaffold slipped on the rods and fell or caused the plaintiff to fall, then under such circumstances, if the jury believe that as a result of the painting of such rods the plaintiff was in-

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jured, the defendant is not liable and the plaintiff cannot recover in this action."

"13. The court instructs the jury that the defendant is not liable for the injury he sustained, if the injury was due to a risk of which the plaintiff knew, or, by the exercise of ordinary care, might have known; therefore, if the jury believe from the evidence that the plaintiff knew, or, by the exercise of ordinary care, might have known, that the rods on which the top timber of the scaffold on which he was working rested were freshly painted and made slippery by the fresh paint, he assumed the risk of the top timber slipping off the rods, and he cannot recover."

While these instructions doubtless unnecessarily repeat the rule invoked, the defendant was entitled to have the jury substantially thus instructed, and the refusal of the court to do so constitutes reversible error.

In addition to this, the court gave the jury instructions Nos. 3, 4, 5 and 7, as follows:

"3. That the degree of care required of the plaintiff to entitle him to recover is such as should be reasonably expected from an ordinarily prudent person in his situation, that is to say, reasonable care. If he exercised such degree of care, he is entitled to recover damages for any injuries sustained, if the proximate cause thereof was the defendant's negligence as alleged in the declaration not in excess of the sum of twenty thousand dollars ($20,000)."

"4. That if they believe from the evidence that the plaintiff has proven the allegations of any one or more counts of the declaration herein by a preponderance of the evidence and that the plaintiff suffered and sustained injuries in the mode and manner charged in one or more counts of the declaration herein, and that he was in the exercise of ordinary care for his own safety, then they should find for the plaintiff and assess his damages in any sum they may

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think proper not in excess of twenty thousand dollars ($20,000)."

"5. The court charges you that on a structure of this kind, the master is required by law to exercise reasonable care and supervision to see that ordinary risks and perils of employment are not unreasonably increased by any omissions or acts on its part to provide for the safety of its employees; and, if you find that this scaffold, ordinarily, was reasonably safe for the work required, and that the defendant, through its agents and servants, changed the conditions of safety surrounding this scaffold, and that the risk was unreasonably enhanced by slippery paint on the rods of which defendant knew or ought to have known, and that the plaintiff was ordered by the defendant's foreman to work on this scaffold, under these conditions, and the plaintiff exercising due care, was injured without negligence on his part, and the slippery condition of the rods aforesaid was the proximate cause of the injury, then the defendant has failed in its duty to provide a reasonably safe place to work, and it is your duty to find for the plaintiff unless you believe the danger was so apparently great that the plaintiff knew or ought to have known of it and kept off the scaffold."

"7. If the jury believe from the evidence that Hipp was ordered by his foreman to work upon the scaffold, and that he knew that there was danger in doing the work assigned him in the particular way in which he was ordered to do it, yet if the danger was not so imminent that a reasonably prudent man would not have attempted it under the direction of his foreman, and the said Hipp used such reasonable care as an ordinarily prudent man would have exercised, and was injured, then the defendant, E. I. duPont de Nemours and Company, is liable, and you should find for the plaintiff and assess his damages at a sum not to exceed twenty thousand dollars ($20,000), provided negligence of the defendant was the proximate cause of the injury."

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In each of these instructions the defense of assumption of risk was entirely ignored, and yet each of them directed a verdict for the plaintiff. That this is prejudicial error is well settled by many cases in Virginia. *C. & O. Ry. Co.* v. *Saunders*, 116 Va. 826, 83 S. E. 374; *Va. & S. W. Ry. Co.* v. *Skinner*, 117 Va. 851, 86 S. E. 131; *Atlantic Coast Line R. Co.* v. *Newton*, 118 Va. 222, 87 S. E. 618.

There was no secret or unknown fact; all that the defendant knew the plaintiff also knew. The accident, if caused by the wet paint, was most unusual, and proper care does not require the anticipation of unusual events or make an employer an insurer against all accidents. To make the employer responsible there must be negligence, and negligence is the doing or failing to do some act which a person of ordinary prudence could foresee would naturally and probably cause the injury complained of. If on the one hand we assume, as in fairness we must, that the plaintiff, with his knowledge and experience, did not realize that the risk was increased by the fresh paint, we must also assume that the defendant did not realize such increased danger, if any. If, on the other hand, we take the view which is urged for the plaintiff and hold that the defendant must be charged with knowledge of such increased risk, then we must also conclude that the plaintiff also knew of it, and in that event it follows inevitably that he assumed that risk.

The assumed risk doctrine is based upon right reason, and is supported by impregnable authority, but because of the increased dangers to which modern progress has subjected industrial workers, the humane principle embodied in workmen's compensation laws should doubtless displace it. This relief, however, can only come from the legislature, and this has been recognized in Virginia by the recent act on the subject.

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The record is voluminous. Several other errors are assigned, and many other questions are argued. We, however, do not think that any good purpose would be served by prolonging this discussion. For the errors indicated, the verdict must be set aside, the judgment reversed, and the case remanded for a new trial, if the plaintiff shall be so advised.

Reversed.

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Syllabus.

Wytheville.

ELLIOTT'S KNOB IRON, STEEL AND COAL COMPANY v. STATE CORPORATION COMMISSION.

June 13, 1918.

1. PENALTIES AND FORFEITURES—*Self-Executory.*—A forfeiture created by Constitution or statute law may be self-executory, contrary to the rule that in all forfeitures accruing at common law nothing vests in the Government until some legal step shall be taken for the assertion of its right.
2. PENALTIES AND FORFEITURES—*Self-Executory.*—Where a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute.
3. PENALTIES AND FORFEITURES—*Self-Executory—Strict Construction—Derogation of Common Law.*—A constitutional or statutory provision for a forfeiture to become effective before "some legal step" has been taken by the Commonwealth for the assertion of the forfeiture, as by inquest of office or some judicial proceeding or finding, is in derogation of the common law and, hence, will be strictly construed.
4. CORPORATIONS—*Presumption in Favor of Continued Existence and Against Forfeiture of Charter.*—Every presumption is in favor of the continued existence and against the conclusion that the charter of a corporation has been forfeited. Hence, the courts are always disinclined to hold that the charter of a corporation has been forfeited. This is especially true where the Commonwealth is not claiming that a forfeiture has occurred, but the contrary, and no third person is so claiming; for the forfeiture of corporate franchises can be effected only by the State or private persons under statutory authority.
5. CORPORATIONS—*Waiver of Forfeiture—Construction Against Forfeiture.*—However clear the right of the State to forfeit the franchise of a corporation, it may waive such right. Unless, indeed, it is forbidden to do so by the State Constitution. And

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in the construction of the Constitution, it must be strictly construed against the result of a forfeiture of the charter of a corporation.

6. CORPORATIONS—*Forfeiture of Charter—Section 157 of the Constitution.*—The object of section 157 of the Constitution of 1902 is not the forfeiture of the charter of any corporation, but the collection by the Commonwealth from every corporation of an annual registration fee and the requirement from it of an annual report "of the status, business or condition of such corporation." The revocation and annulment of the charter of such corporation is merely a penalty which the Constitution provides shall be imposed for the failure of a corporation to pay its annual registration fee or to make its said annual reports.

7. CORPORATIONS—*Section 157 of the Constitution of 1902—Whether Self-Executory—Forfeiture of Charter—Registration Fees—Reports.*—The provision in section 157 of the Constitution of 1902 imposing annual registration fees upon corporations and requiring annual reports from corporations, is not self-executory. The Constitution leaves it discretionary with the legislature to provide reasonable regulations with respect to how and when such annual registration fee should be assessed and with respect to how and when such fees should become due and payable, and with respect to the making of the annual reports. And in view of the "general laws" in fact enacted by the legislature (Acts 1902-3-4, page 137, sections 45, 48, tax bills 1903, 1906, section 41), it follows that the constitutional provision must be construed to mean that it did not impose the penalty of the "revocation and annullment of the charter" of a corporation until there was an assessment of its annual registration fee as provided in such "general laws," and it had thus become due and payable and there was thereafter the "failure" or default specified in the Constitution to pay such fee, *or* until there was the report required of it by the State Corporation Commission in accordance with such "general laws" and there was thereafter the "failure" or default specified in the Constitution to make such report.

8. CORPORATIONS—*Registration Fee—Necessity of Assessment.*—The State Constitution, by self-executing ordinance, or the legislature, by self-executing statute, unless prohibited by the State Constitution, might have made a declaration of forfeiture of the charters of corporations upon their mere failure, for a specified time, to pay their annual registration fees or to make their reports of status, business or condition, independently of any attendant or preliminary steps in procedure with respect to these matters having been taken or not taken

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by the State through its governmental agency, the State Corporation Commission, this was not done by the provisions of the Constitution of 1902, section 157; sections 45 and 48, Acts 1902-3-4, page 137, tax bills 1903, 1906, section 41.

9. CORPORATIONS—*Registration Fee—Necessity of Assessment.*—Section 157 of the Constitution of 1902 did not itself impose the tax (the annual registration fee), but left with the legislature the duty to impose it. Consequently, the authority inherent in the legislature to prescribe the method or system of such taxation was not taken away from it by the Constitution. The method or system adopted by the legislature for imposing such tax was to provide for an assessment of it by the State Corporation Commission. Under well established rules concerning taxation, such tax could not be considered as imposed or as having become due and payable until there was an assessment of it by the State Corporation Commission.

10. TAXATION—*Strict Construction of Statute.*—Laws imposing taxes are strictly construed against the taxing power and in favor of the citizen and they are never held to have been imposed unless by express statutory enactment or by necessary implication therefrom.

11. CORPORATIONS—*Registration Fee—Necessity of Assessment.*—Where the legislature has prescribed a method or system of taxation which includes the requirement of an assessment, all the steps in the procedure of the assessment required by the statute must be taken before the tax can be considered as having been imposed and as having become due and payable. And it is immaterial which process of the assessment is concerned, the listing or the valuation for taxation, if an assessment is included in the system or method of taxation prescribed. It is equally immaterial whether the valuation includes the exercise of judicial judgment as to the value of property or is a mere ascertainment of facts and application thereto of a scale of taxation fixed by statute.

12. CORPORATIONS—*Report—Failure to Make as Ground for Forfeiture.*—Under section 157 of the Constitution of 1902 and the tax bills of 1903 and 1906, section 41, the report, the failure of the making of which is one ground of forfeiture, is a "report of the status, business and condition" of the corporation. As to such report it is manifest from both the statute as contained in the tax bills of 1903 and 1906 and from section 157 of the Constitution, that a discretion was vested in the State Corporation Commission as to the form of it and as to what details it should cover; and no default in making such report occurs until such a report is required

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of the corporation by affirmative action of the State Corporation Commission by forwarding forms for such report to the corporation.

13. CORPORATIONS—*Forfeiture of Charter—Section 157 of the Constitution of 1902—Tax bill 1903.*—In the case at bar the corporation contended that under the tax bill of 1903 its charter was forfeited for its failure, for the period designated in the Constitution (section 157) and in such statute, to make the report of "the amount of its maximum capital stock as of the first day of January" of 1904. It is true that the tax bill of 1903 did require such a report; but that statute, as is apparent from an examination of it, did not provide the penalty of forfeiture for any failure to make such report. It was from the failure to make report of "its status, business or condition as the State Corporation Commission shall require," from which the forfeiture was to ensue, and not from the failure to make the report of the amount of its maximum capital stock.

14. CORPORATIONS—*Estoppel.*—The failure of the Commonwealth to annually assess a corporation with the registration fee imposed by law and to require the report of the status, business or condition of the corporation annually for a number of years, will not estop the Commonwealth from making the assessment and requiring the report.

Appeal from the State Corporation Commission.

Affirmed.

The appellant was incorporated by the Circuit Court of Augusta county, Virginia, June 13, 1890, and its charter was duly recorded as required by law in the office of the Secretary of the Commonwealth, June 29, 1890, with an authorized capital stock of "not less than one million dollars * * * and not more than ten million dollars * * *"

By section 157 of the Constitution of Virginia of 1902, a constitutional provision was adopted which was not contained in the State Constitution theretofore existing, and which, so far as material in the instant case, is as follows:

"Section 157. Fees from corporations. Provision shall

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be made by *general laws for the payment* * * * to the Commonwealth by every domestic corporation, * * * of an annual registration fee of not less than five dollars nor more than twenty-five dollars, which shall be irrespective of any specific license, or other tax imposed by law upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; *and for the making*, by every such corporation (*at the time of paying such annual registration fee*), *of such report* to the State Corporation Commission, of the status, business or condition of such corporation, *as the General Assembly may prescribe.* * * * *The failure* by any corporation *for two successive years to pay its annual registration fee, or to make its said annual reports*, shall, *when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter* of such corporation; * * * *and the General Assembly shall provide additional and suitable penalties* for the failure of any corporation to comply promptly with the requirements of this section, or of any laws passed in pursuance thereof. The commission shall compel all corporations to comply promptly with such requirements, *by enforcing in the manner* hereinbefore authorized, such fines and penalties against the delinquent company as may be provided for, or authorized by this article; * * *" (Italics supplied.)

In pursuance of such constitutional provision, the legislature, thereafter, enacted the following statutes on the subject, namely:

Sections 45 and 48 of the Acts of Assembly, 1902-3-4, page 137 (Code 1904, section 1313-a), which became a law April 15, 1903 (so far as material), as follows:

"(45) That the" (State Corporation) "commission shall have made and kept in its clerk's office a register of all corporations, which register shall contain the corporate names

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of all corporations heretofore chartered and existing at this date, so far as the same may be obtainable, and those hereafter chartered by the laws of this State * * * and as to domestic corporations shall contain also the following information, to-wit: Date of incorporation. * * * Amount of capital stock. * * * Nature of corporate enterprise or business to be conducted. The place of its principal or general office or place of business.

"The Secretary of the Commonwealth shall forthwith prepare and furnish to the commission a list of all charters recorded in his office up to April first, nineteen hundred and three, containing the above information as far as shown by the records of his office."

"(48) That *the commission* shall *annually*, on or before the first day of December, *notify each corporation subject to a registration fee of the amount thereof, and when the same is payable*, and when paid its clerk shall promptly receipt therefor to the corporation paying the same, such notice to be mailed to the last address furnished by such company." (Italics supplied.)

The tax bill, which became a law April 16, 1903 (so far as material), as follows:

"41. Every domestic corporation, other than a purely charitable institution * * * whose maximum capital stock exceeds three hundred thousand dollars, shall pay an annual registration fee of twenty-five dollars; said annual registration fee shall be irrespective of any specific license tax or other tax or fee imposed by law upon said corporation for the privilege of carrying on its business in this State or upon its franchise, property, or receipts.

"Every corporation shall obtain from the State Corporation Commission a blank form upon which to report the amount of its maximum capital stock, as of the first day of January of each year, and shall file its report made upon

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such blank form with the State Corporation Commission by the first day of February of each year.

"The State Corporation Commission shall assess against such corporation the registration fee herein imposed, and a certified copy of the assessment, when made, shall be immediately forwarded by the clerk of the State Corporation Commission to the Auditor of Public Accounts, and to each such corporation.

"Upon the payment of said annual registration fee the State Corporation Commission shall issue a certificate of registration, and the clerk of said State Corporation Commission shall record said certificate in a proper book to be kept by him for the purpose.

"Every domestic * * * corporation at the time of paying such registration fee shall make to the State Corporation Commission, on forms prescribed by it, such report of its status, business, or condition as the State Corporation Commission shall require.

"The failure of any corporation for two successive years to pay its annual registration fee, or to make such report, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation * * * and the State Corporation Commission shall publish the fact of such revocation or annulment once a week, for four consecutive weeks, in a daily newspaper published in the city of Richmond, Virginia." Laws 1902-1904, chapter 148.

The tax bill which became a law March 17, 1906, amended the last three paragraphs of section 41 of the tax bill of 1903 next above quoted so that the whole of such statute (so far as material) read as follows:

"Every domestic corporation, other than a purely charitable institution * * * whose maximum capital stock exceeds three hundred thousand dollars, shall pay an annual

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registration fee of twenty-five dollars; said annual registration fee shall be irrespective of any specific tax or other tax or fee imposed by law upon said corporation for the privilege of carrying on its business in this State, or upon its franchise, property or receipts.

"The State Corporation Commission *shall ascertain from its records* the amount of the authorized maximum capital stock of each of said corporations, as of the *first day of January* of each year, and shall assess against each such corporation the registration fee herein imposed, and a certified copy of the assessment, when made, shall be forwarded by the clerk of the State Corporation Commission, before the fifteenth day of February, to the Auditor of Public Accounts, and to each such corporation.

"The State Corporation Commission may require every domestic * * * corporation, in the month *of January, in each year,* and within such time as it may prescribe, to make the commission, on forms prescribed by it, such report of the status, business, and condition of each such corporation as the commission may call for.

"The failure of any corporation for two successive years to pay its annual registration fee, or to make such report, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate, *without further proceedings,* as a revocation and annulment of the charter of such corporation, * * * and the State Corporation Commission shall publish the fact of such revocation or annulment once a week for four consecutive weeks in a daily newspaper published in the city of Richmond, Virginia." (Italics supplied.) Laws 1906, chapter 294.

(The changes in the statute law on the subject made by the last named statute are indicated by the italicising which has been supplied.)

The appellant as a matter of fact was not *assessed* with any annual registration fee or *notified* to pay any such fee

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until the order complained of was entered by the State Corporation Commission, which is as follows:

"Commonwealth of Virginia,
"Department of the State Corporation Commission.
"Case No. 663.
"City of Richmond, November 22nd, 1917.

"Whereas, the Elliott's Knob Iron, Steel and Coal Company was incorporated by a decree of the Circuit Court of Augusta county, Virginia, entered June 13, 1890, and the charter so granted was duly recorded in the office of the Secretary of the Commonwealth, June 20, 1890, the principal office being Staunton, Virginia, and the maximum capital authorized by said charter being ten million dollars; and

"Whereas, this corporation has failed to obtain from the State Corporation Commission the forms upon which to make report of the amount of its maximum capital stock as of the first day of January of each of the years 1904, 1905 and 1906, and failed to make the report for such years as required by section 41 of the act entitled 'An act to raise revenue for the support of the government and public free schools and to pay the interest on the public debt, and to provide a special tax for pensions, as authorized by section 189 of the Constitution,' approved April 16, 1903, and on account of the failure of said corporation to make such report the State Corporation Commission has made no assessments of the annual registration fee and franchise tax for these and subsequent years; and

"Whereas, it has now been brought to the attention of the commission that Elliott's Knob Iron, Steel and Coal Company, on the first day of January, 1904, owned between twenty-six thousand and twenty-seven thousand acres of mountain land in the western portion of Augusta county, Virginia, and it was its duty under the law to make the

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aforesaid report in order that the State Corporation Commission might assess it with the annual registration fee and franchise tax under sections 41 and 43 of the tax laws above referred to; and

"Whereas under similar conditions it has been the custom of the State Corporation Commission to assess the annual registration fee and franchise tax for all of the years 1904 to date; and

"Whereas, by an act of the General Assembly approved March 17, 1906, section 41 of the tax law was so amended as to make it the duty of the State Corporation Commission to ascertain from its records the amount of the authorized maximum capital stock of each of said corporations as of the first day of January of each year and assess against each such corporation the registration fee herein imposed, and further the section was so amended as to leave the question of requiring reports under it to the discretion of the State Corporation Commission, and the commission being authorized by law to use its discretion in this matter, has not required reports to be made by corporations under the provisions of this section, but has proceeded to assess upon information secured from its own records:

"Therefore, it is ordered that the annual registration fee, under section 41, and the annual franchise tax, under section 43 of the tax law, be assessed against Elliott's Knob Iron, Steel and Coal Company for each of the years 1904 to 1917, inclusive, and that the said assessments be served upon Fitzhugh Elder, Esquire, attorney for the corporation, Staunton, Virginia, by the clerk of the commission, and that copies of said assessments be certified by the said clerk to the Auditor of Public Accounts, the aggregate of such assessments being as follows:

"For registration fee for years 1904 to 1917, inclusive, 14 years, at $25.00 a year.....$ 350.00

"For franchise tax for years 1904 to 1917, inclusive, 14 years, at $1,100 a year..... 15,400.00

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"Assessments.

"And thereupon the annual registration fee, under section 41, and the annual franchise tax, under section 43 of the tax law, were assessed against Elliott's Knob Iron, Steel and Coal Company for each of the years 1904 to 1917 inclusive, and the said assessments were served upon Fitzhugh Elder, attorney for the corporation, Staunton, Virginia, by the clerk of the commission, and copies of said assessments were duly certified by the said clerk to the Auditor of Public Accounts, such assessments being in the words and figures following."

(Then follows separate annual assessments of appellant accordingly, for each of the years 1904 to 1917 inclusive, all dated at Richmond, Va., November 22, 1917 of "Registration fee $25.00. Franchise tax $1,100.00," stating in effect, that such assessments were respectively payable "on or before March 1, 1904," 1905-6-7-8-9-10-11-12-13-14-15 and 1916, with no penalties added except for the years 1911 to 1916 inclusive, but for the latter years a penalty of five per cent. on the registration fee and franchise tax and six per cent. interest from March 1st of such years respectively to date of final settlement are imposed as penalties, as stated in such assessments, for the default of appellant in not having made payment of such fee and tax on such March 1st dates, but the order complained of does not require any five per cent. penalty to be paid or any interest, except, of course, interest would run from the date of the order on the $15,400 aggregate of franchise taxes covered thereby until paid.)

The said order sufficiently sets forth the facts constituting the reasons for the failure of the Corporation Commission to make the assessment aforesaid any sooner than it did.

The statute law authorizing the assessment of the annual State franchise tax aforesaid is not drawn in question in

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the instant case, so far as its phraseology is concerned, and, hence is not here quoted. See section 43, Acts Assembly 1902-3-4, at page 182.

Fitzhugh Elder, for the appellant.

Jno. R. Saunders, Attorney-General, and *J. D. Hank, Jr., Assistant Attorney-General*, for the appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The position of the appellant is that by virtue of the provision of the Constitution of the Commonwealth of Virginia above quoted and the statute law enacted in pursuance thereof the failure of the appellant for two years to pay its annual registration fee of 1904 or to make in 1904 its annual report of the amount of its maximum capital stock and the continuance of such failure for ninety days after the expiration of such two years, *ipso facto* forfeited the charter of the appellant, so that its existence was thereby extinguished. Hence that it was not in being so as to be assessable with any registration fee or franchise tax for the years subsequent to 1906 covered by the order complained of. That the Corporation Commission had no power to assess it for any registration fees and franchise tax save only for the years 1904, 1905 and 1906. That beyond such assessments the order complained of is invalid, void and of no effect.

Such position raises the following questions:

1. If the Constitution of 1902 and the statutes above quoted, when correctly construed, would have the effect of declaring the character of appellant forfeited in accordance with the position aforesaid of the latter, would such constitutional and statutory provisions be void because in conflict with the Constitution of the United States (Article

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1, section 10) which declares that—"No State shall * * * pass * * * any law impairing the obligation of contracts * * * "?

2. Was the charter of the appellant *ipso facto* forfeited, in accordance with the position aforesaid of appellant, upon the mere occurrence of its default, at the time, and its continuance for the period aforesaid?

In the view we take of the case it will be unnecessary for us to consider the first question, since in our opinion the second question must be answered in the negative.

Coming then to the consideration of the second question:

1. It is true that a forfeiture created by Constitution or statute law may be self-executory, contrary to the rule that "in all forfeitures accruing at common law nothing vests in the government until some legal step shall be taken for the assertion of its right." *United States* v. *Grundy*, 3 Cranch 337-351, 2 Law Ed. 459; 5 Thomp. on Corp. (1st ed.), sections 6586-7-8.

As said by Chief Justice Marshall in the case last cited: "Where a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute."

But a constitutional or statutory provision for a forfeiture to become effective before "some legal step" has been taken by the Commonwealth for the assertion of the forfeiture, as by inquest of office or some judicial proceeding or finding, is in derogation of the common law and, hence, will be strictly construed.

As is said by Mr. Justice Story in *Fairfax's Devisees* v. *Hunter's Lessee*, 7 Cranch 603, 3 Law Ed. 453, at page 459: "But it is contended that the common law as to inquests of office and seizure, so far as the same respects the

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land in controversy, is completely dispensed with by statutes of the Commonwealth so as to make the grant to the original plaintiff in 1789 complete and perfect. * * * But such an effect ought not, upon principle of public policy, to be presumed upon light grounds. * * * The common law, therefore, ought not to be deemed to be repealed, unless the language of the statute is clear and explicit for this purpose."

As said in 5 Thomp. on Corp. (2nd ed.), section 6475: "But it requires strong and unmistakable language to authorize the court to hold that the legislature intended to dispense with all judicial proceeding declaring a dissolution." (Citing numerous cases.)

As said by Chief Justice Waite in *St. Louis, etc., R. Co.* v. *McGee*, 115 U. S. 469, 473, 6 Sup. Ct. 123, 125, 29 L. Ed. 446, 448: "* * * until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislative action legally equivalent to a judgment of office found at common law * * * legislation to be sufficient to accomplish that result must manifest an intention by Congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture and judgment therein establishing the right, it should be direct, positive and free from all doubt or ambiguity." See for same holding, *Bybee* v. *Oregon, etc., R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305, 307.

As said in *Nicolai* v. *Maryland Agr. Ass'n*, 96 Md. 323, at page 329, 53 Atl. 965, at page 967: "There can be no doubt that the legislature may use such language in a charter as will make a forfeiture clause self-executing and the corporation will *ipso facto* cease to exist, but it requires strong and unmistakable language to work such results, and 'in the construction of clauses prescribing a condition or contingency, the courts seem generally opposed to

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that construction which supports a forfeiture *ipso facto* without judgment of dissolution in a court proceeding. 9 Ency. Law (2nd) 553.'"

Moreover, every presumption is in favor of the continued existence and against the conclusion that the charter of a corporation has been forfeited. Hence, the courts are always disinclined to hold that the charter of a corporation has been forfeited. 10 Cyc. 1279; 5 Thomp. on Corp. (2nd ed.), section 6523. This is especially true in such a case as that before us, where the Commonwealth is not claiming that a forfeiture has occurred, but the contrary, and no third person is so claiming; for the forfeiture of corporate franchises can be effected only by the State or by private persons under statutory authority (10 Cyc. 1278); and however clear the right of the State to forfeit the franchise of a corporation, it may waive such right. 10 Cyc. 1088. Unless, indeed, it is forbidden to do so by the State Constitution. And in the construction of the Constitution, upon the same principles above adverted to, it must be strictly construed against the result of a forfeiture of the charter of corporations.

This brings us to the consideration of the provision of our Constitution (section 157 above quoted), on this subject. As should be noted, the object of such constitutional provision is not the forfeiture of the charter of any corporation, but the collection by the Commonwealth from every corporation of an annual registration fee and the requirement from it of an annual report "of the status, business or condition of such corporation." The "revocation and annulment of the charter of such corporation" is merely a penalty which the Constitution provides shall be imposed for the failure of a corporation "to pay its annual registration fee or to make its said annual reports." It is the manifest intendment of the Constitution that the corporation shall continue in existence as a source of revenue to the

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Commonwealth, so long as its status, business or condition is reported as the legislature, in accordance with the Constitution, may prescribe. The forfeiture of its charter defeats that purpose. It is very true that the specified default is allowed to have such a result; but it is not to be assumed, in the absence of a specific provision in the Constitution to that effect, that it intended to prohibit the legislature from providing certain preliminary steps in procedure for the collection of the revenue and for the ascertainment of the status of corporations, before the default which might result in such forfeiture should be considered as having occurred. And just here we come to the consideration of precisely what "failure" or default it is which must result in the imposition by the Constitution of the penalty aforesaid. And here we observe that the Constitution is not self-executory in the imposition of the annual registration fee or the requirement of the annual reports aforesaid. The constitutional requirement is that, "Provision *shall be made by* general laws for the payment to the Commonwealth * * * by every domestic corporation of an annual registration fee * * * and for making by every such corporation (at the time of paying such annual registration fee) of such report to the State Corporation Commission, of the status, business or condition of such corporation * * *" (Italics supplied.) It follows that the Constitution, by such provision, left it discretionary with the legislature when it came to enact such "general laws" to provide reasonable regulations with respect to how and when such annual registration fee should be assessed and with respect to how and when such fees should become due and payable, and with respect to the making of the reports aforesaid. In view of the "general laws" in fact enacted accordingly by the legislature (above quoted), it further necessarily follows that such constitutional provision must be construed to mean that it did not impose the

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penalty aforesaid of the "revocation and annulment of the charter" of a corporation until there was an assessment of its annual registration fee as provided in such "general laws," and it had thus become due and payable and there was *thereafter* the "failure" or default specified in the Constitution to pay such fee, *or* until there was the report aforesaid required of it by the State Corporation Commission in accordance with such "general laws" and there was *thereafter* the "failure" or default specified in the Constitution to make such report.

In other words, while there can be no doubt that the State Constitution, by self-executing ordinance, or the legislature, by self-executing statute, unless prohibited by the State Constitution, might have made a declaration of forfeiture of the charter of corporations upon their mere failure, for a specified time, to pay their annual registration fees or to make their reports of status, business or condition, independently of any attendant or preliminary steps in procedure with respect to these matters having been taken or not taken by the State through its governmental agency, the State Corporation Commission, it is manifest to us that this was not done by the provisions of the Constitution and statutes aforesaid. This seems clear to us from a mere consideration of such provisions themselves. We are strengthened in our view of the correctness of such conclusion by our consideration of the following authorities:

In the cases of *Silliman* v. *Fredericksburg, etc., R. Co.*, 27 Gratt. (68 Va.) 119; *Staats* v. *Board*, 10 Gratt. (51 Va.) 400; *Wild's Lessee* v. *Serpell*, 10 Gratt. (51 Va.) 405; *Hale* v. *Branscum*, 10 Gratt. (51 Va.) 418; *Levasser* v. *Washburn*, 11 Gratt. (52 Va.) 572; *Matney* v. *Ratcliff*, 96 Va. 231, 31 S. E. 512 (cited and relied on by appellant), the statutes involved made the declaration of forfeiture in question upon the mere failure of the corporation or person affected to perform a certain act. In the first-named case

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the act to be performed was the completion of a railroad to a point fixed, by a date prescribed in the statute itself; and in all of the other cases the act to be performed was the causing by the land owner of the entry of his lands to be made on the commissioner's books, and to that end he was required to return a list of his lands for taxation. Under the law as it stood and was involved in the latter cases, the statute did not provide for an assessment of lands by the commissioners of revenue going upon them in the absence of a list of land furnished the commissioner by the land owner. The statutes involved required no attendant or preliminary steps in procedure with respect to such acts to be taken by the State through any of its governmental agencies. The statute law in imperative and distinct terms, preceding the event, made a declaration of forfeiture to take effect upon the mere happening of that event. The legislature having thus spoken in unmistakable terms, nothing remained for the courts to do in the premises but to allow the statutory enactment to take effect when the event occurred.

In *Kinney* v. *Beverley*, 2 Hen. & Mun. (12 Va.) 318, however, cited and relied on by the appellee, the statute involved expressly provided, "That in case the tax on any tract of land shall not be paid for the space of three years, the right to such land shall be lost, forfeited and vested in the Commonwealth;" and there was nothing in that statute limiting the effect of such express provision. But there was passed by the same session of the legislature which enacted such statute, another act which provided for the assessment of lands for taxation by commissioners whose duty it was to make such assessment, and the land owners were not required to return a list of their lands or to cause an entry thereof to be made on the commissioner's books. The court held that, since under the last-named statute law no collection could have been made of taxes on land until it was as-

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sessed for taxation, no forfeiture of the land had occurred under the first-named statute, by reason of the non-payment of the taxes on the land for the statutory period. In his statement of the case at page 325 of 2 Hen. & Mun., Judge Tucker says: "The law is that the forfeiture shall take place in case the tax be not paid. What tax? Surely that which has been duly assessed and imposed. But when the lands have not been listed, no tax has been assessed and imposed upon them."

So in the case before us, the Constitution did not itself impose the tax (the annual registration fee), but left with the legislature the duty to impose it. Consequently, the authority inherent in the legislature to prescribe the method or system of such taxation (Desty on Taxation, section 87, page 426) was not taken away from it by the Constitution. The method or system adopted by the legislature for imposing such tax was to provide for an assessment of it by the State Corporation Commission. Under well established rules concerning taxation, such tax could not be considered as imposed or as having become due and payable until there was an assessment of it by the State Corporation Commission. Desty on Taxation, section 91, page 443; section 92, page 449. No collection could have been made of it by the Commonwealth until it was so assessed. As said by Desty on Taxation, section 91, page 443: "The manner of imposing the taxes prescribed by law must be followed and the authority strictly pursued." Again, *idem*, section 92, page 449: "The legislature has power to prescribe the form of proceedings in the assessment and collection of taxes, and on matters of form may declare what steps shall be essential to the validity of a tax. The essentials of a valid tax are (1) a levy by a competent legislative authority; (2) a valid assessment of property upon which such tax is levied. * * * The assessment is necessary to the validity of a tax; and taxes are not due unless they are assessed, how-

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ever equitable they may be. * * * It is the basis of all subsequent proceedings and not to be dispensed with, as a tax levied without any list or valuation is void. * * * Assessment is so far an inseparable incident to taxation that no right of action arises until an assessment is made. * * *"

Hence under the case of *Kinney* v. *Beverley, supra,* prior to its assessment there could have been in the instant case no default or "failure" of the appellant to pay the tax (the registration fee) in question, since that tax, as contemplated by section 157 of the Constitution and the statute law aforesaid enacted in pursuance thereof, was the registration fee "duly assessed and imposed."

It is contended by appellant that, inasmuch as the annual registration fee aforesaid was fixed by the statute in proportion to the maximum capital stock of the appellant, no assessment by the State Corporation Commission was a condition precedent to the tax (the registration fee) becoming due and payable; and it is urged that the case is the same principle as that of a license tax imposed by statute where no assessment of it is essential to its collection. But this position loses sight of the consideration that where license taxes are collectible without prior assessment they are so collectible because the statute law imposing them does not provide for any assessment of them by any governmental agency. Such statute law expressly requires their payment without the preliminary step in procedure of an assessment. If the statute law imposing license taxes should prescribe such preliminary step in procedure, then the license taxes would be uncollectible until such procedure was had. The principle upon which this rule rests is that laws imposing taxes are strictly construed against the taxing power and in favor of the citizen and they are never held to have been imposed unless by express statutory enactment or by necessary implication therefrom. Desty on Taxation, section 91, page 443; *Combined Saw, etc., Co.* v.

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Flournoy, 88 Va. 1029, 14 S. E. 976; *Brown* v. *Commonwealth*, 98 Va. 366, 36 S. E. 485; *Harris* v. *Commonwealth*, 81 Va. 240, 50 Am. Rep. 666; *Kloss* v. *Commonwealth*, 103 Va. 864, 49 S. E. 655.

It is further urged upon our consideration by appellant that there is a distinction to be taken between assessments which require a valuation to be made by the governmental agency making the assessment and assessments which do not require any valuation, as where the statute fixes the valuation and the assessment is made merely by listing the tax-payer and stating the amount of the tax as fixed by statute. We do not think that such a distinction is material in the case before us. Every assessment consists of two processes,—(1) the listing of the subjects of the taxation (the tax-payer and the subject taxed) and (2) adjudging the valuation by which the tax is ascertained. Desty on Taxation, section 93, page 456. Where the statute provides therefor, a tax list is as essential to the validity of the assessment as is the valuation. Desty on Taxation, section 112, pages 577-8. This is so because the whole proceeding is statutory and where the legislature has prescribed a method or system of taxation which includes the requirement of an assessment, all the steps in the procedure of the assessment required by a statute must be taken before the tax can be considered as having been imposed and as having become due and payable. And it is immaterial which process of the assessment is concerned, the listing or the valuation for taxation, if an assessment is included in the system or method of taxation prescribed as aforesaid. It is equally immaterial whether the valuation includes the exercise of judicial judgment as to the value of property or is a mere ascertainment of facts and application thereto of a scale of taxation fixed by statute. The material question on the subject is—what does the statute, which prescribes the method or system of taxation, provide shall be done by

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some governmental agency as a part of the procedure of assessment? Whatever is so required is a preliminary step —a condition precedent—to the imposition of the tax, and until such step is taken the tax has not been imposed and has not become due and payable.

Now with respect to the tax (the annual registration fee) in the case before us:

By the tax bill of 1903 above quoted it was provided that—"The State Corporation Commission *shall assess* against each such corporation the registration fee *herein imposed,* and a certified copy of *the assessment, when made,* shall be immediately forwarded by the clerk of the State Corporation Commission to the Auditor of Public Acounts and to each such corporation." (Italics supplied.)

We are of opinion that while such statute was in force, namely, until it was amended by the tax bill of 1906 quoted in the statement above, preceding this opinion, no tax of the annual registration fee aforesaid was imposed until the assessment directed as aforesaid was made, and a certified copy thereof was forwarded to the Auditor of Public Accounts and to appellant, as required by the statute. We are further of opinion that the change of phraseology in the clause of the statute under consideration by the amendment of it in the tax bill of 1906 did not affect its construction in the particulars just mentioned and that under such statute as amended no annual registration fee was imposed upon appellant until the assessment was made, and a certified copy thereof was forwarded to the Auditor of Public Accounts and to appellant as required by such amended statute.

No such assessment of such annual registration fee having been made until the order complained of was entered by the State Corporation Commission, it follows, of course, that there has been no revocation or annulment of the charter of appellant by reason of the provisions of the Consti-

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tution and statute law aforesaid on that subject because of a failure of the appellant to pay such fees or any of them for the period named in the Constitution and statute law on the subject.

Now with respect to the report required of appellant under the Constitution and statute law aforesaid:

It clearly appears from a consideration of the constitutional provision and the tax bills of 1903 and 1906 that the report, the failure of the making of which is one ground of the forfeiture aforesaid, is a "report of the status, business and condition" of the corporation. As to such report it is manifest from both the statute as contained in the tax bills of 1903 and 1906 and from section 157 of the Constitution, that a discretion was vested in the State Corporation Commission as to the form of it and as to what details it should cover; and we are of opinion that no default in making such report occurred on the part of the appellant until such a report was required of it by affirmative action of the State Corporation Commission by forwarding forms for such report to appellant with the call upon it for such report. The correctness of this conclusion is not, indeed, seriously questioned by appellant.

Appellant, however, contends that under the tax bill of 1903 its charter was forfeited for its failure, for the period designated in the Constitution (section 157) and in such statute, to make the report of "the amount of its maximum capital stock as of the first day of January" of 1904. It is true that the tax bill of 1903 did require such a report; but that statute, as is apparent from an examination of it, did not provide the penalty of forfeiture aforesaid for any failure to make such report. It was from the failure to make report of "its status, business or condition as the State Corporation Commission shall require," from which the forfeiture aforesaid was to ensue, and not from the

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failure to make the report of the amount of its maximum capital stock.

But one other consideration urged upon us by appellant need be dealt with. It is insisted that the Commonwealth should not be allowed to take advantage of its failure to do what it was required by law to do, namely, assess the registration fee aforesaid annually and require the report of the status, business or condition of appellant annually. Such a position is indeed unique. Our attention has not been called to any other case like it and we have discovered none in the books in our investigation of the subject. It is rare that a victim insists upon the imposition of the extreme penalty of the law, where that penalty is the extinction of his or its existence. There can be no doubt that if the positions of the appellant and the Commonwealth were reversed and the latter was insisting upon the forfeiture of the charter of the appellant, the Commonwealth would be held not entitled to maintain such a position because of its failure to take the preliminary steps in procedure required by its own Constitution and statutes in order to impose upon appellant the duty to pay the tax and make the reports in question. It would be unquestionably held in such case that until the duty to pay the tax or make the report arose there could be no default on the part of appellant in any failure to make such payment or to make such report. The position taken before us by appellant in the instant case is, in effect, that the negligence of the Commonwealth, through its officials, must operate to change its constitutional ordinance and statutory enactments on the subject. This would be to effect constitutional and statutory enactment by application of the doctrine of estoppel and by the application of such doctrine against the Commonwealth, a sovereign body. On principle the doctrine of estoppel can have no such application. Moreover in the instant case the appellant's own action in the past has been inconsistent with its present

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position that its charter was forfeited and its existence ended upon the expiration of two years and ninety days from its failure to pay in 1904 its registration fee for that year. As appears from the petition of appellant it has continued to do business as a corporation since it claims to have forfeited and put an end to its existence as such. As stated in the petition—"Petitioner has agreed and bound itself, in so far as it has authority, so to do, to sell the fee of the 'Big Survey' (25,360 acres of land) from which the timber has been heretofore sold. * * * However, it being suggested that the State of Virginia might claim or assess * * * an annual registration fee and franchise tax against petitioner * * *," the proceeding upon review before us was set in motion to ascertain whether the proceeds of said sale were liable to said taxation. The question before us of the forfeiture of the corporate existence of appellant is raised at its instance in the midst of its activities in the exercise of its corporate life. Unlike the Commonwealth, it is not a sovereign body, which cannot be deprived of any of its rights without its own consent expressed through the legislature or other governmental agency duly authorized by the legislature so to do. It would seem, therefore, that the doctrine of estoppel, if it has any application, would apply against the appellant rather than in favor of it. However, the other reasons for our conclusion above stated are sufficient therefor.

Therefore, for the foregoing reasons, we are of opinion that there is no error in the order complained of and it will be affirmed.

Affirmed.

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Wytheville.

FARDIS & BOUDOURIS v. E. I. DUPONT DE NEMOURS AND COMPANY.

June 13, 1918.

Absent, Burks, J.

1. ORDER OF PROOF.—In an action for destroying a building to prevent the spread of fire, the order of proof not being material, the court, in the exercise of its discretion, might permit evidence to be introduced of acts and conduct of persons wearing the uniform of the defendant, on condition that it should later be made to appear that such persons were acting as agents and employees of the defendant, and within the scope of their employment.
2. EVIDENCE—*Striking out Evidence—Failure to Connect Defendant with Acts Introduced.*—In an action for destroying a building to prevent the spread of fire, the court permitted the introduction of evidence as to the acts and conduct of defendant's uniformed policemen, upon the understanding that it should later be made to appear that these persons were acting as agents and employees of the defendant, and within the scope of their employment. This the plaintiff failed to do.

   Held: That it was not error for the court to strike out the evidence referring to the acts and conduct of the police officers.
3. EVIDENCE—*Striking out Evidence—Failure to Connect Defendant with Acts Introduced.*—Where in addition to instructing the jury to disregard all evidence introduced as to the acts or statements of the police in defendant's uniform, the court further directed them to disregard all evidence with reference to the destruction of the building, no prejudice resulted to the plaintiff. It would probably have been sufficient for the court to have simply told the jury to disregard any evidence as to the conduct and statements of the policemen, but the exclusion of that evidence necessarily ended the case so far as the defendant was concerned.
4. ASSIGNMENT OF ERRORS—*Record—Exclusion of Evidence.*—Where an assignment of error complains of the action of the court in

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refusing to allow a witness to answer a question, the failure of the record to disclose by avowal or otherwise what answer the witness would have made, or what knowledge he had on the subject, is fatal to the assignment.

Error to a judgment of the Corporation Court of city of Hopewell, in an action of trespass on the case. Judgment for defendant. Plaintiffs assign error.

Affirmed.

The opinion states the case.

Henley, Hall, Hall & Peachy, for the plaintiff in error.

Plummer & Bohannan and *Mann & Townsend,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

Fardis & Boudouris were the owners of a large brick building in Hopewell. While a fire was raging there on the 9th of December, 1915, this building was destroyed by explosives in an effort to check the progress of the flames. Fardis & Boudouris brought this action against E. I. DuPont de Nemours and Company, alleging, in their first count, that the defendant, by its agents and servants, wrongfully and unlawfully entered and blew up the building, and, in their second count, that the defendant, by its agents and servants, wrongfully and unlawfully took possession of the building, depriving plaintiffs of its control, and that, while in the control of the defendant, it was blown up and destroyed.

There was a verdict and judgment below in favor of the defendant, and the plaintiffs assign error.

The fire in question destroyed a large part of the town. The water supply and other fire-fighting facilities were

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wholly inadequate. The disastrous result of the "widespread conflagration" is recited in the preamble to one of the public acts of the State. (Acts 1916, page 102.) From the outset it made very rapid progress, and after it had destroyed a number of buildings and appeared to be beyond control, a group of persons in police uniform took forcible possession of the plaintiffs' premises, compelled them to leave, and destroyed the building. The plaintiffs had placed several inches of sand on the roof and floors, and had saturated the same with water. This and other precautions they claimed would have saved the building, and they protested against its destruction. The policemen who entered the building, and a majority of those who kept the crowd away on the outside, were dressed in the uniform of the DuPont police force, but they appeared to be working to a common end along with men wearing the uniform of Hopewell policemen, and with other local people dressed as civilians. Explosives were also applied to other buildings during the progress of the fire.

It does not appear how "the DuPont policemen" were appointed, what were their duties, or whether they were on duty at all at the time of the fire. There is no proof whatever that they were acting under either express or implied authority from the defendant. It does not even appear that the property of the DuPont Company was in danger. One witness testified that the fire, which had changed its course a time or two, was burning in the direction of the defendant's plant at the time of the destruction of the building in question, but there was other property between the latter and the plant, and the evidence fails to disclose the distance to the plant, or that this intervening property was so situated as to become, in case it caught fire, a source of danger to the defendant's property.

The defendants objected to the evidence of the acts and conduct of the persons wearing DuPont uniforms unless it

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should be made to appear that they were acting as agents and employees of the defendant, and within the scope of their employment; and the court throughout the trial held that the evidence was admissible only upon that condition. At the conclusion of the plaintiffs' evidence the defendant offered no proof, but moved the court to exclude all evidence referring to the destruction of the building and all evidence referring to any acts, conduct or statement made by any of the police officers, on the ground that it had not been shown that such police officers, if they were employees of the defendant, were acting within the scope of their employment, or doing any work which had been allotted to them by the defendant. This motion was sustained, the court instructing the jury "to disregard all evidence introduced by the plaintiffs of any acts or statements made by any person in DuPont uniform with reference to the destruction of the building, and to disregard all evidence with reference thereto."

This action of the court, which forms the basis of the principal assignment of error and gives rise to the controlling question in the case, was in our opinion free from error.

There was no proper foundation for the admission of the evidence which the court excluded, and it might have properly been kept out of the case entirely until the authority and agency of the so-called DuPont policemen had been made to appear. The order of proof, however, not being material, the court, in the exercise of its discretion, permitted the evidence in question to be introduced on condition that the defendant should thereafter be connected with it, and when that condition failed, it was proper practice to exclude the evidence from the jury. The question was not one of weight, but of admissibility.

It is earnestly contended that the court, in any event, ought not to have gone so far as to strike out the evidence with reference to the destruction of the building. There

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was, however, no possible prejudice resulting to the plaintiffs from this action. It would probably have been sufficient for the court to have simply told the jury to disregard any evidence as to the conduct and statements of the DuPont policemen; but the exclusion of that evidence necessarily ended the case so far as the defendant was concerned. The plaintiffs failed to connect the defendant with the destruction of the building, and the verdict which the jury rendered was the only one which could have been sustained.

The other assignments of error have been carefully considered. With one possible exception, their materiality depended wholly upon the ability of the plaintiffs to connect the defendant with the destruction of the building, and, with that possible exception, none of them involved an offer to prove anything in aid of that vital requirement. This exception, if it be one, is found in the fourth assignment, which complains of the action of the court in refusing to allow a witness to answer the following question: "About the period of this fire in December, 1915, did not the DuPont police force assist in the government of the city affairs?" In the absence of any kindred issue in the case, we are unable to perceive how either an affirmative or a negative reply to this inquiry could have availed the plaintiffs anything, but if we assume that they intended to develop the materiality of the question by further evidence, the record fails to disclose by avowal or otherwise what answer the witness would have made, or what knowledge he had on the subject, and this in itself is fatal to the assignment. *Lynchburg Cotton Mills* v. *Rives*, 112 Va. 137, 142, 70 S. E. 542; Burks' Pleading and Practice, page 515, section 283.

Having reached the foregoing conclusions, it becomes unnecessary to discuss the defendant's further contention that the plaintiffs' property would, as a necessary result of the course and extent of the fire, have been destroyed thereby, if it had not been previously dynamited.

We find no error in the judgment, and it must be affirmed.

Affirmed.

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Wytheville.

FURCRON V. GURKIN.

June 13, 1918.

Absent, Burks, J.

1. BOUNDARIES—*Plats.*—If it be conceded that in a proper case the clerk's record of a plat will have to be treated as a verity, this is not so where no question of registry as an element of title is involved, but the decisive question is as to the true subdivision of the property as actually made by the owners.
2. BOUNDARIES—*Burden of Proof.*—Defendant was in possession of a lot as defined by an amended plat recorded in the manner provided by law, and his residence occupied a part of the land in dispute when the plaintiff acquired title to the adjoining lot from the defendant's grantor.

   Held: That the burden was upon the plaintiff to establish the location of the line.
3. BOUNDARIES—*Burden of Proof—Sufficiency of Evidence.*—In the case at bar, plaintiff's theory was that the line should be made perpendicular with the street upon which the lots faced. His evidence only went far enough to show that this theory could be carried into effect by either of two ways, and afforded no rational ground for adopting the method which would bring the land he sued for within the boundaries of his lot.

   Held: That this evidence, as a matter of law, was insufficient to sustain a verdict in plaintiff's favor.
4. BOUNDARIES—*Plat—Construction—Questions of Law and Fact.*—A land company the owner of a tract of land subdivided it into blocks, lots and streets and recorded a plat thereof in the manner provided by law. In this plat the lots fronting on a street approached the same obliquely, and the land company decided that it was desirable to change the plat so as to make the lots perpendicular to the avenue. It, therefore, entered into an agreement with the other parties in interest, which recited that it was the desire of all the parties in interest to make a change in the plat, so as to make the lots perpendicular to the streets on which they fronted. This agreement and the amended plat

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referred to therein were duly recorded. The plat attached to the agreement, adopted and recorded by the land company, was a complete and accurately defined scheme of subdivision, free from any element of uncertainty or ambiguity. It was an executed, practical and final interpretation of what the land company intended to do, and was expressly declared by the agreement to supersede the original plat and to be binding on all parties.

Held: That no room was left for construction, and that it was error for the trial court to permit the jury to consider and construe the agreement along with the plat attached thereto, in determining the true boundary line between two lots, and the recital in the agreement of a desire to make the lots perpendicular became unimportant and immaterial in view of the actual adoption of a plat whose lines are clearly and unmistakably fixed, although not exactly perpendicular.

Error to a judgment of the Circuit Court of city of Norfolk, in an action of ejectment. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

G. M. Dillard and *R. M. Hughes,* for the plaintiff in error.

Wm. G. Maupin, John B. Jenkins, Jr., and *G. Tayloe Gwathmey,* for the defendant in error.

KELLY, J., delivered the opinion of the court.

This action of ejectment was brought by J. A. Gurkin against W. A. Furcron to recover possession of a portion of a lot, which may be conveniently designated as Lot 25 in Block 55, fronting on Colonial avenue, in the city of Norfolk. The plaintiff prevailed in the lower court, and the defendant assigns error.

The Sterling Place Company, a corporation, being the owner of a tract of land in Norfolk, subdivided the same into blocks, lots and streets, recording a plat thereof in the

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manner provided by law. This subdivision was so made as that the lots fronting on Colonial avenue approached the same obliquely, and the Sterling Place Company decided that it was desirable to change the plat so as to make the lots perpendicular to the avenue. The only other parties then interested in the change were C. W. Grandy, the owner of a note secured by a deed of trust on the property, and H. C. Davis, the trustee. On the 17th day of February, 1905, the Sterling Place Company, C. W. Grandy and H. C. Davis, trustee, entered into an agreement which, so far as material here, was as follows:

"Whereas, it is the desire of all parties in interest to make a change in that portion of the plan of the company lying south of Gray street and Pocahontas avenue on said plat, by which certain lots in Blocks 53, 54, 55, 56, 57 and 58 shall be changed so as to be made perpendicular to the streets on which they front, and,

"Whereas, the parties have agreed upon a plat amending that portion of the original plat to that extent, which is hereto annexed;

"Now, therefore, in consideration of the premises, the parties hereby agree and consent to and with each other that the plat hereto annexed shall amend and supersede the corresponding portion of the original plat, and shall be recorded as a plat binding on all parties in interest."

This agreement and the plat referred to therein were duly admitted to record.

After some years had elapsed, and after a number of the lots in Block 55, as replatted, including Lots 25 and 26 which are directly involved in this litigation, had been sold and conveyed by reference to the replat, it developed that the new lateral lines, while apparently and approximately so, were not, in fact, exactly perpendicular; and this controversy grew out of that fact. The plaintiff contends for lines at exact right angles to Colonial avenue. We insert

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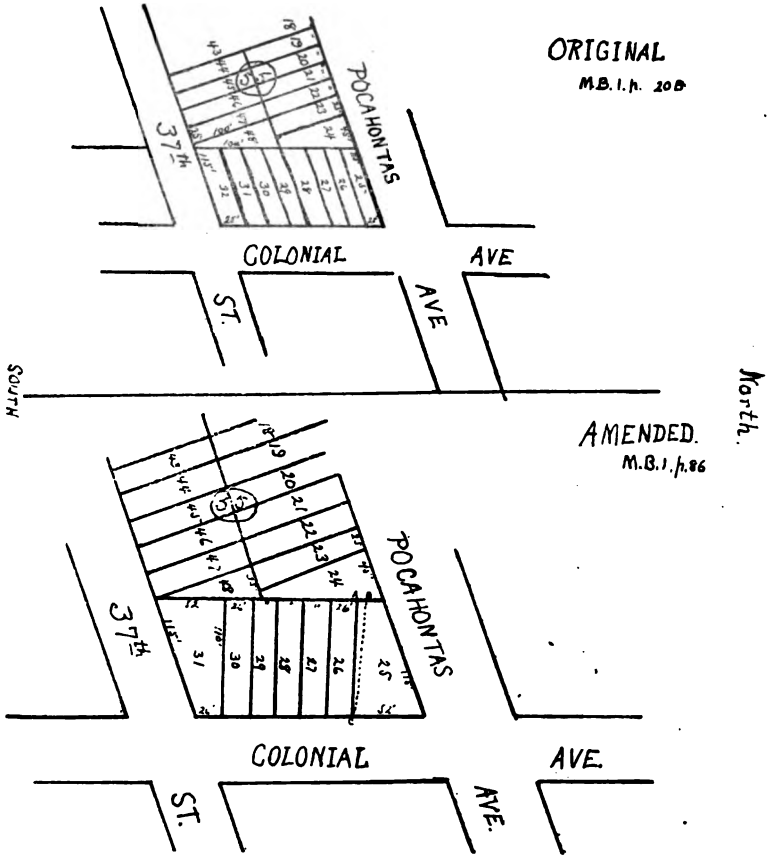
here copies of the original and amended plats of Block 55, as recorded. The land in dispute is indicated upon the amend plat by the triangle A, B, C, south of the dotted line in Lot 25.



It will be seen that the rear dimension of Lot 25 does not appear in figures on the amended plat. It is a *concessum* in the case, however, and is manifest as a mathematical deduction, that this dimension is necessarily shown by the

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plat itself to be twenty-six feet. Pocahontas avenue and Thirty-seventh street are parallel. The total of the rear lines of the lots is 208 feet, and the total of their front lines is the same. The front and rear dimensions of each of the other lots on Colonial avenue are conceded to be correctly given according to the scheme of subdivision represented by the replat, and the remaining rear line of Lot 25 must, therefore, be twenty-six feet. In this connection, it may be added that the original replat, an exact copy of which was lodged with the clerk for recordation, expressly showed that all of the lots on the replat, except Lot 31, were twenty-six feet in the rear, having the figures "26'" on the rear of Lot 25, the clerk having manifestly made a mistake in spreading the plat on the record. The defendant contends that this fact is immaterial. We do not think so. If it were conceded that in a proper case the clerk's record would have to be treated as a verity, the decisive question in this case is as to the true subdivision of the property as actually made by the owners. No question of registry as an element of title is involved.

The plaintiff in this action, John A. Gurkin, is the owner of Lots 26 and 27, which, though acquired by him after the defendant had purchased Lot 25, were sold and conveyed by the land company to the plaintiff's predecessor in title in 1909 by the following description: "Lots numbers twenty-six (26) and twenty-seven (27) in Block number fifty-five (55) each of said lots fronting twenty-six (26) feet on the western side of Colonial avenue, and extending back, between parallel lines, one hundred and ten (110) feet, as shown on the plat of the property of the party of the first part, known as Colonial Place, which plat is duly of record in the clerk's office of the Corporation Court of the city of Norfolk, along with a certain agreement made between the party of the first part, Theodore F. Rogers, trustee, and Egbert G. March, executor and trustee, and Henry N. Tifft,

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substituted trustee, dated February 2, 1904, and duly recorded in said clerk's office, in deed book 141-A, page 198, which said plat and agreement were subsequently modified by a further agreement between the party of the first part, and Hugh C. Davis, trustee, and C. W. Grandy, dated the 17th day of February, 1905, duly recorded in said clerk's office in deed book 145-B, page 294."

The defendant, W. A. Furcron, is the owner of Lot 25, sold and conveyed to him by the land company in 1910 by the following description: "Lot number twenty-five (25) in Block number fifty-five (55), said lot being bounded and described as follows, to-wit: Beginning at the southwest intersection of Pocahontas and Colonial avenues, and extending westwardly, along the southern side of Pocahontas avenue one hundred and fifteen feet; thence southwardly, and parallel with Colonial avenue, twenty-six (26) feet to the northern line of Lot number twenty-six in said Block number fifty-five; thence eastwardly, along the northern line of Lot number twenty-six, one hundred and ten (110) feet, to the western side of Colonial avenue; and thence northwardly, along the western side of Colonial avenue, fifty-two (52) feet to the point of beginning; as shown," (etc., as in deed to plaintiffs lots).

The plaintiff, of course, only claims that Lot 26 has front and rear lines twenty-six feet in length. His contention means that all the division lines between the lots on the amended plat are wrong, and should be at exact right angles with the avenue. This would result in upsetting the entire plat as to those lots; and it is to be observed that his contention for "perpendicular" lines could be satisfied in either of two ways: first, by commencing, as he wishes to do, on Colonial avenue fifty-two feet south of Pocahontas avenue, and extending the division line at right angles to the former so as to cut off a portion of the defendant's Lot 25; and, second, by commencing at the rear corner of Lot 31 on

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Thirty-seventh street, measuring fifty-two feet along the rear line to the corner of Lot 31, and running thence at right angles to the avenue. Either method, carried to its conclusion, would result in reforming the plat so as to make the dividing lines exactly perpendicular; but either would increase the size of one of the corner lots and correspondingly decrease the size of the other. The former method would give the defendant less land than he bought, and give the plaintiff what he seeks here, a part of defendant's house and lot, the latter's loss in area being gained by the owner of Lot 31. The latter method would invert the triangle, add it to the defendant's lot, and the loss would fall to the owner of Lot 31. We are offered no satisactory reason, and can conceive of none, why the one method rather than the other should be adopted. This selection made by the plaintiff appears to be entirely arbitrary. The defendant was in possession of Lot 25 as defined by the amended plat, his residence occupying a part of the land now in dispute, when the plaintiff acquired title to Lot 26. The burden was upon him to establish the location of the line. (*Wood* v. *Phillips*, 117 Va. 878, 881, 86 S. E. 101 and cases cited). His evidence, even upon the theory that the lines must be made exactly perpendicular, only went far enough to show that this theory could be carried into effect by either of two ways, and afforded no rational ground for adopting the method which would bring the land he sued for within the boundaries of his lot. This evidence, as a matter of law, was insufficient to sustain a verdict in his favor.

But there is another view of the case which in our opinion is likewise fatal to the plaintiff.

The trial court, over the objection of counsel for the defendant, permitted the jury to consider and construe the agreement of February 17, 1905, along with the plat attached thereto, in determining the true boundary line be-

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tween Lot 25 and Lot 26. This, we think, was error. The plat attached to the agreement, adopted and recorded by the land company, was a complete and accurately defined scheme of subdivision, free from any element of uncertainty or ambiguity. It was an executed, practical and final interpretation of what the land company intended to do, and was expressly declared by the agreement to supersede the original plat and to be binding on all parties. No room was left for construction. The recital of a desire to make the lots perpendicular becomes unimportant and immaterial in view of the actual adoption of a plat whose lines are clearly and unmistakably fixed. The tier of lots fronting on Colonial avenue constitute a parallelogram, the four corners of which are absolutely determined, and there is no dispute as to either of those corners. The course and total length of the front and rear lines are identical, and the dimensions of the front and rear of each lot having been accurately shown on the plat, every lot is necessarily defined by reference to fixed and known corners. This being true, if the plat itself had called for a "perpendicular" course, the division lines would have had to vary therefrom to conform to the established corners. In this case, however, if it can be said that the degree or course is called for at all, it appears in an agreement which refers to and adopts the amended plat as the final interpretation of what the agreement proposed to do.

The foregoing considerations, are, in our opinion, conclusive of the case and render it unnecessary to discuss other assignments of error involving questions which cannot arise in any future trial.

The judgment complained of will be reversed, and the cause remanded for a new trial to be had, if the plaintiff shall be so advised, not in conflict with the views herein expressed.

Reversed.

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Wytheville.

HARRISON, EXECUTOR, v. COMMONWEALTH.

June 13, 1918.

1. TAXATION—*Omitted Taxes—Remission of Interest and Penalties.*—Section 508 of the Code of 1904, as amended by the act of March 22, 1916 (Acts 1916, chapter 491), provides that when omitted intangible personal property, money and incomes are voluntarily reported on oath to the examiner of records, on or before August 1, 1916, on forms prescribed and such reports are found correct, and the taxes thereon paid before November 1, 1916, the taxes paid shall not be subject to interest or penalty. To entitle a taxpayer to the benefits of the provisions of this section, he must make it appear that he voluntarily reported the omitted property on oath to the examiner of records on or before August 1, 1916, on forms provided by the Auditor, and that the report was found correct. In the case at bar, it was held that the applicant for relief had not met these requirements, and had not made such effort to report the omitted property as could be held tantamount to a compliance with the statute.
2. TAXATION—*Omitted Taxes—Penalties and Interest.*—Under the law (section 603, Code of 1904, as amended by Acts 1906, page 31), two obligations rest on the taxpayer, one is to see that his property is properly assessed, and the other is to pay the tax thereon by December 1st following, if he would escape the penalty. If a taxpayer who makes a full and correct return of his property to the commissioner of the revenue and fails to pay the tax in time cannot escape the penalty, then *a fortiori* a person or corporation subject to taxation who refuses or fails to make a return should be subject to the same penalty as one who made a return but failed to pay the taxes.

Error to a judgment of the Circuit Court of New Kent county, on a motion for relief against interest and penalties upon omitted taxes. Judgment for the Commonwealth. Plaintiff assigns error.

Affirmed.

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The opinion states the case.

O'Flaherty, Fulton & Byrd, for the plaintiff in error.

John R. Saunders, Attorney-General, J. D. Hank, Jr., Assistant Attorney-General, O. L. Shewmake and *J. Vaughan Gary,* for the Commonwealth.

KELLY, J., delivered the opinion of the court.

C. L. Harrison, executor of Julia W. Harrison, instituted this proceeding by motion for relief against interest and penalties upon certain omitted taxes assessed against the estate for the years 1903 to 1915, inclusive. The relief was denied by the circuit court, and the executor brings the case here for review.

No question is made as to the validity or amount of the taxes charged under the assessment, and the sole question presented for our decision is whether the evidence was sufficient to entitle the executor to exoneration from payment of the interest and penalties under the following provision of section 508 of the Code, as amended by an act of March 22, 1916:

"When omitted intangible personal property, money and incomes are voluntarily reported on oath to the examiner of records, on or before August first, nineteen hundred and sixteen, on forms prescribed by the Auditor of Public Accounts, and such reports are found correct and the tax thereon paid before November first, nineteen hundred and sixteen, or where said omitted property, money or incomes have already been assessed and shall have been paid before said date, then the taxes paid on such property, money or income shall not be subject to interest or penalty." Acts 1916, c. 491.

The terms of this statute are plain and simple. To en-

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title a taxpayer, in a case of this kind, to the benefit of its provisions, he must make it appear that he voluntarily reported the omitted property on oath to the examiner of records on or before August 1, 1916, on forms provided by the Auditor, and that the report was found correct. We do not think the applicant has met these requirements.

Mrs. Julia W. Harrison, a resident of New Kent county, died February 23, 1916, leaving an estate consisting of money, stocks and bonds, which she disposed of by will. The executor qualified in March, 1916. Sometime prior to July first of that year, he was advised by counsel that he ought to make a report to the examiner of records (who, it may be noted, under section 3326-a of the Code is charged with the duty of reporting for current taxation property held by fiduciaries), and accordingly a correspondence was begun with the examiner, during the course of which his counsel wrote the latter as follows:

"Your letter of the twenty-second instant relative to omitted taxes on the estate of the late Julia W. Harrison received, and in reply beg to state that we are informed that Mrs. Harrison died February 26, 1916, and that there were no omitted taxes except on about $25,000 in money which she had in bank on February 1, 1916. All the estate which came into the executor's hands was transferred from New York, and since the death of Mrs. Harrison, and was, therefore, not taxable on or before February 1, 1916, in Virginia, and we understand that Mrs. Harrison had paid her income tax for previous years. The estate would, therefore, be assessable on $25,000 money in bank as of February 1, 1916.

"Write us if you desire any further information."

It is clear from this letter that the executor did not propose to return any property for taxation for the years prior to 1916. On July 30th or 31st, he went in person to the office of the examiner at Yorktown to confer with him

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in regard to the taxes assessable against the estate. The testimony as to what took place at that time is conflicting, and we shall not attempt to review this or the other evidence in the case in full. The executor testified, in substance, that he sought the interview for the purpose of doing all that the law required him to do with reference to the taxes assessable against the estate; that he so informed the examiner, and asked for his advice and instructions on the subject. The testimony of the examiner, on the other hand, is to the effect, that he understood the executor to be inquiring only about the 1916 taxes, and accordingly advised him that inasmuch as the testatrix died after the first of February, 1916, the taxes for that year should be assessed by the commissioner of the revenue, without any action on the part of the examiner. The latter testimony is strongly corroborated by the terms of a letter of instructions which, at the request of the executor, the examiner at that time wrote and delivered to him, and which concluded with the following statement: "In my opinion, as Mrs. Harrison did not die until after the first of February, 1916, the time at which all taxes are presumed to be assessed, the tax on her estate existing at that time will be assessed against her by the commissioner of the revenue for your county for the year 1916."

The examiner further testified that the matter of the omitted taxes was mentioned at the interview at Yorktown, and that the executor said: He "did not know what Mrs. Harrison's property was for the omitted years, and could form no estimate of it." That the examiner is accurate in this narrative seems highly probable, because the executor's own testimony shows that, whether he made this alleged statement or not, it was a fact that he did not then have with him the necessary data and could not have made a report for the years prior to 1916, even if he had gone there for that purpose. As a matter of fact, he never did

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furnish the report, and the examiner of records finally reported the omitted property to the local board of review upon information obtained from other sources.

It is not claimed, of course, in this case that the applicant for relief made a report of the omitted property in the form and within the time required by the statute; and upon a careful review of all of the evidence in the case, we are clearly of the opinion that he did not make any such effort to report the omitted property as could be held tantamount to a compliance with the statute.

The contention that the law makes no provision for penalties in this class of cases, but only for interest, is fully met by the opinion of this court delivered by Judge Cardwell in *Commonwealth* v. *United Cigarette Machine Co.*, 119 Va. 447, 476, 89 S. E. 935.

There was no error in the judgment complained of, and it is affirmed.

Affirmed.

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Syllabus.

Wytheville.

HOLLYWOOD CEMETERY COMPANY v. COMMONWEALTH.

June 13, 1918.

1. TAXATION—*Exemptions—Personal Property of Cemetery Company.*—The intangible property, in which the accumulated funds of a cemetery company, a corporation, are invested, is liable to taxation.
2. TAXATION—*Exemptions—Constitutional Law.*—Under the Constitution of 1869, by section 3 of Article X, the legislature had authority to exempt certain classes of property, but since the Constitution of 1902 became effective all tax exemptions are thereby fixed, and there can be no other such exemptions. The most casual consideration of section 183 of the Constitution of 1902 shows clearly and distinctly the purpose of the convention thereafter to make it impossible for the legislature to create any exemptions from taxation, for it not only provides in detail affirmatively just what property can be exempted from taxation, but expressly denies the legislature the power to add thereto, and specifically prohibits the exemption of any other property. No historical discussion of the provisions of former Constitutions or legislation can make obscure the clear meaning of section 183 of the Constitution, so far as it affects this question.
3. TAXATION—*Exemptions—Cemeteries.*—The burying grounds and the lots therein exclusively used for burial purposes, owned by a cemetery company or by its lot owners, are exempted from taxation. No other property owned by the company is exempted from taxation, and the legislature is itself prohibited from exempting from taxation any other property of cemetery companies.
4. CONSTITUTIONAL LAW—*Statutes—Construction of Statutes and Constitutions.*—When the words of Constitutions and of statutes are unambiguous and have a clear and definite meaning, indicating their purpose, it is well settled that courts are not permitted to interpret that which needs no interpretation, and that general rules for the construction of statutes of doubtful meaning have no application. If the intention is

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manifest from the language used and leads to no absurd conclusion, courts must give such provisions the effect clearly intended.

5. TAXATION—*Exemptions—Cemeteries—Fund Appropriated to Cemetery Company by State.*—The legislature appropriated $8,000 to certain trustees and charged them with the duty of securing and executing a contract with the Hollywood Cemetery Company, binding that company to keep the graves of Confederate dead in the soldiers' section in Hollywood cemetery in "perpetual care," upon condition that the Commonwealth should be forever discharged from any further obligation to make any further appropriations to care for the graves of Confederate soldiers buried there. This trust was fully executed by the trustees, and the $8,000 paid over to the company. The company had absolute title to the fund and might use it for any purpose authorized by its charter.

Held: That there was no force in the company's claim that this fund constituted a trust of which the State was the beneficial owner, and, therefore, it was exempt from taxation.

Error to a judgment of the Hustings Court of city of Richmond, on a motion to correct an erroneous assessment. Judgment for the Commonwealth. Plaintiff assigns error.

Affirmed.

The opinion states the case.

M. M. Gilliam and *Samuel A. Anderson,* for the plaintiff in error.

John R. Saunders, Attorney-General, J. D. Hank, Jr., Assistant Attorney-General, and *Leon M. Bazile,* for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

The question to be determined in this case is whether or not the intangible property, in which the accumulated funds

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of the Hollywood Cemetery Company, a corporation, are invested, is liable to taxation. The trial court decided the question against the company, which is here alleging error and seeking relief against that judgment. The correctness of the decision depends upon the proper construction of pertinent sections of Article 13 of the Constitution of 1902, on taxation and finance.

Section 168 requires that all property, except as thereinafter provided, shall be taxed; and so much of section 183, referring to property which is exempt from taxation, as it is deemed necessary to quote reads as follows:

"Section 183. Except as otherwise provided in this Constitution, the following property, and no other, shall be exempt from taxation, State and local; but the General Assembly may hereafter tax any of the property hereby exempted save that mentioned in sub-section (a):

"(a) Property directly or indirectly owned by the State, however held, and property lawfully owned and held by counties, cities, towns or school districts, used wholly and exclusively for county, city, town, or public school purposes, and obligations issued by the State since the fourteenth day of February, eighteen hundred and eighty-two, or hereafter exempted by law.

"(b) Buildings, with land they actually occupy, and the furniture and furnishings therein lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

"(c) Private family burying-grounds not exceeding one acre in area, reserved as such by will or deed, or shown by other sufficient evidence to be reserved as such, and so exclusively used, and public burying-grounds and lots therein exclusively used for burial purposes, and not conducted for

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profit, whether owned or managed by local authorities or by private corporations.

"(d) This clause exempts buildings with the land actually occupied, furniture, furnishings, books and instruments, wholly devoted to educational purposes, belonging to, and actually and exclusively occupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions of learning, including the Virginia Historical Society, together with certain other specified property owned by such churches, libraries and educational institutions.

"(e) Real estate belonging to, actually and exclusively occupied, and used by, and personal property, including endowment funds, belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, which are not conducted for profit, but purely and completely as charities.

"(f) Buildings, with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes; and

"(g) Property belonging to the Association for the Preservation of Virginia Antiquities, the Confederate Memorial Literary Society, and the Mount Vernon Ladies' Association of the Union."

Section 488 of the Code, following the Constitution quite strictly, provides that certain personal property, precisely identical with that specified in section 183 of the Constitution, and no other, shall be exempt from taxation, State and local, and no reference is anywhere made to any personal property owned by cemetery companies. The Code,

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section 457, also provides that certain real estate, precisely identical with that specified in section 183 of the Constitution, and no other, shall be exempt from taxation, State and local, and re-enacts, as clause "c" of that statute, subsection (c) of section 183 of the Constitution above quoted.

Under the Constitution of 1869, by section 3 of Article X, the legislature had authority to exempt certain classes of property, but since the Constitution of 1902 became effective all tax exemptions are thereby fixed, and there can be no other such exemptions.

The most casual consideration of this section 183 of the present Constitution shows clearly and distinctly the purpose of the convention thereafter to make it impossible for the legislature to create any exemptions from taxation, for it not only provides in detail affirmatively just what property may be exempted from taxation, but expressly denies the legislature the power to add thereto, and specifically prohibits the exemption of any other property. No historical discussion of the provisions of former Constitutions or legislation can make obscure the clear meaning of section 183 of the Constitution, so far as it affects this question. The burying grounds and the lots therein exclusively used for burial purposes, owned by the company or by its lot owners, are exempted from taxation. This accords with the previous policy of the State for many years. It is equally manifest that no other property owned by the company is exempted from taxation, and that the legislature is itself prohibited from exempting from taxation any other property of cemetery companies.

When the words of Constitutions and of statutes are unambiguous and have a clear and definite meaning, indicating their purpose, it is well settled that courts are not permitted to interpret that which needs no interpretation, and that general rules for the construction of statutes of doubtful meaning have no application. If the intention is

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manifest from the language used and leads to no absurd conclusion, courts must give such provisions the effect clearly intended. *Commonwealth* v. *Gaines*, 2 Va. Cas. (4 Va.) 172; *Price* v. *Harrison*, 31 Gratt. (72 Va.) 117; *Johnson* v. *Mann*, 77 Va. 265; *Ryan* v. *Krise*, 89 Va. 733, 17 S. E. 128; *London Bros.* v. *National Bank*, 121 Va. 460, 93 S. E. 699.

That the personal property of cemetery companies is generally held liable to taxation under Constitutions and statutes which exempt their real estate, is shown by the following cases: *Rosedale Cemetery Association* v. *Linden*, 73 N. J. L. 421, 63 Atl. 904; *Commonwealth* v. *Lexington Cemetery Co.*, 114 Ky. 165, 70 S. W. 280; *State* v. *Wilson, President of Baltimore Cemetery Co.*, 52 Md. 638; *State, ex rel* v. *Casey*, 210 Mo. 235, 109 S. W. 1; *Milford* v. *County Commissioners*, 213 Mass. 162, 100 N. E. 60.

One of the points urged in behalf of the company is, that whether liable to taxation upon some of its funds or not, $8,000 thereof which it received in this way is exempt. The General Assembly by act of March 2, 1914 (Acts 1914, page 37), reciting that it had for several years theretofore made appropriations from the State treasury to aid various memorial associations throughout the State in caring for the graves of Confederate dead in the several cemeteries in different sections of the State, and among others had made annual appropriations to aid the Hollywood Memorial Association in caring for the graves of the dead Confederates in Hollywood cemetery, proceeded to make an appropriation of $8,000 to certain ladies as trustees, and charged them with the duty of securing and executing a contract with the Hollywood Cemetery Company binding that company to keep the graves of Confederate dead in the soldiers' section in Hollywood cemetery in "perpetual care," upon condition that the Commonwealth should be forever discharged from any further obligation to make any further appropriations to care for the graves of Confederate

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soldiers buried there. This trust has been fully executed by the trustees, and the $8,000 paid over to the company. It claims that this fund constitutes a trust of which the State is the beneficial owner, and that, therefore, it is exempt from taxation.

We find it impossible to agree with this contention. The contract shows that the company has absolute title to this fund of $8,000. It may use it in the discretion of those in control of the company for any purpose authorized by its charter. It may certainly expend the principal in improving its own property, or in purchasing other land for enlarging the cemetery, and the record shows that such enlargement is in contemplation. This fund is liable to the debts of the company, and the Commonwealth has no title whatever thereto. We cannot distinguish between the title of the company thereto and its title to any of its other accumulated funds.

Hollywood cemetery is a sacred spot to the people of Virginia. It holds the dust of many of its heroes. The State has always been generous in providing the company with funds when they were needed to enable it properly to care for the graves of the Confederate soldiers buried there. It is doubtless true that had the matter been called to the attention of the last constitutional convention, all of its personal property would have been exempted, just as that of the Confederate Memorial Literary Society was exempted by clause (f) of section 183 of the Constitution. This court, however, is not permitted to indulge either its sentiment or sympathy for the purpose of relieving the company from the burden which the Constitution has clearly imposed upon it as well as upon the other owners of property in the Commonwealth. The taxing officials were compelled, in the performance of their duty, to make the assessment complained of, and the question has been rightly determined by the trial court.

Affirmed.

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Wytheville.

HUNTER v. BURROUGHS.

June 13, 1918.

Absent, Burks, J.

1. PHYSICIANS AND SURGEONS—*Malpractice—Sufficiency of Declaration.*—A count in a declaration in an action for malpractice charged that the defendant who treated the plaintiff with X-rays did not possess and apply sufficient knowledge and experience to anticipate and foresee the probable effect which the application of the X-ray treatment upon plaintiff's legs would produce, and to apply reasonably proper remedies, after using the X-ray treatment, to prevent plaintiff's flesh from being burned, but failed to anticipate the probable effect of the X-ray treatment and failed to apply reasonably proper and appropriate medicines, preventatives and remedies, after the treatment to prevent plaintiff's flesh and skin from being burned.

   Held: That the count contained allegations of fact which sharply and distinctly raised the issue whether the defendant was professionally unskilful and negligent, and was sufficient.

2. PHYSICIANS AND SURGEONS—*Malpractice—Sufficiency of Declaration.*—It was contended that the count referred to in the preceding headnote was defective because it did not state what were reasonably proper and appropriate medicines, preventatives and remedies which should have been used.

   Held: That the issues of fact raised by the count, in so far as they involved the highly specialized art of treatment of the disease of the plaintiff by X-rays, were to be decided, if they could be decided at all, only by the standard fixed by such evidence as might be furnished by experts on the subject. The plaintiff, a layman, could not have had knowledge of what specific "prescriptions, medicines and remedies" a physician of ordinary competency should not have failed to apply, whereas the defendant, if he possessed ordinary competency, upon the charges of professional unskilfulness in the treatment, should have known at once how to defend himself against such charges, by his own testimony and by the testimony of other experts on the subject.

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3. DECLARATION—*Sufficiency.*—Where the allegations of a declaration are sufficient to inform the defendant of the nature and character of the demand against him and state such facts as would enable the court to say, if the facts are proved as alleged, whether they establish a good cause of action, the declaration is good upon demurrer. Allegations in a declaration, which go beyond these requirements by descending into statements of details of proof, are unnecessary.
4. BILL OF PARTICULARS.—If a declaration gives the defendant partial but not complete notice of the nature and character of the plaintiff's claim, a bill of particulars may be required of the latter.
5. PHYSICIANS AND SURGEONS—*Malpractice—Declaration.*—In an action for malpractice, whether this or that specific prescription, medicine or remedy should have been applied or not applied was a mere matter of evidence upon the issue of fact on the allegations of unskilfulness and negligence made by the declaration. To require the declaration to allege such details of evidence would be to depart from the rule established in Virginia on this subject.
6. PHYSICIANS AND SURGEONS—*Malpractice—Declaration—Surplusage.*—A count in a declaration in an action for malpractice charged in general terms that the defendant was unskilful and negligent, and among the allegations of fact constituting such unskilfulness and negligence was an allegation that the defendant did prescribe wholly improper and hurtful medicines, "being two certain salves, which were prescribed by and are known to him," which were wholly unsuited to defendant's condition.

   Held: That the count was good upon demurrer, and would have been good if the part quoted had been omitted, as it was an allegation of a matter of evidence and might be considered as surplusage. Further, as an allegation of fact it was sufficient to inform the defendant of the nature and character of the two salves, since it is alleged that they "were prescribed by and were known to him." This prevented his being taken by surprise by proof of his having prescribed such two salves.
7. APPEAL AND ERROR—*Demurrer—Specifically Stating Grounds of Demurrer.*—Where the objections on demurrer to certain counts in the declaration do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, but it does not appear from the record that any motion was there made by the plaintiff to require or that the court on its own motion required the grounds of demurrer relied on to be stated (section 3271, Code of 1904), and no objection is made by the plaintiff to

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the consideration of the assignments of error by the Supreme Court of Appeals, such assignments will be considered by that court.

8. PHYSICIANS AND SURGEONS—*Malpractice—Declaration.*—A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected to this count that it was fatally defective in that it did not allege that other specialists would not have been guilty of such omission.

Held: That such allegation was in substance and effect contained in the allegations of the count as it stood, and the failure of the count to contain such express allegation did not deprive the defendant of his right to require the same character of proof on the subject as he was entitled to require if such express allegation had been contained in the count.

9. PHYSICIANS AND SURGEONS—*Malpractice—Declaration.*—A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make.

Held: That this count was not demurrable, because it did not allege in detail what test and examination should have been made of the plaintiff before the application of the X-ray, as the details as to whether this or that particular test and examination should have been made, were mere matters of evidence.

10. PHYSICIANS AND SURGEONS—*Malpractice—Declaration—Appeal and Error—Harmless Error.*—A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected that this count was demurrable because it failed to allege, except inferentially, that the plaintiff was in fact more susceptible to the influence of X-rays than other persons, and if such examination had been made it would have resulted in the discovery of such susceptibility.

Held: That the point was well taken; that such allegation should have been made and distinctly made, with definiteness and certainty. An inferential allegation of such material fact was insufficient. But as the case did not turn upon the exist-

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ence of any peculiar susceptibility of the plaintiff to X-rays, and the verdict was based upon other grounds, the error was harmless.

11. PHYSICIANS AND SURGEONS—*Duty to Warn Patient.*—It is not *per se* an act of negligence for a physician to fail to warn a patient of the danger of the possible bad consequences of using a remedy.

12. PHYSICIANS AND SURGEONS—*Malpractice—Promise of Cure.*—A count in a declaration alleged that the plaintiff consulted defendant, a physician, regarding eczema and as to the proper treatment thereof; that the defendant knew, or should have known, of the danger of X-ray treatment in such case and misled the plaintiff by not only giving him no warning, but by affirmatively assuring him that the X-ray treatment would cure him. The count also alleged that had defendant given plaintiff warning of the danger of the X-ray treatment he would not have submitted to the treatment.

Held: That the count stated a good cause of action against the defendant for giving, not a mere opinion, but the positive assurance of cure alleged.

13. PHYSICIANS AND SURGEONS—*Malpractice—Joinder of Causes of Action.*—It was contended that the count referred to in the preceding syllabus was sounded in contract and not in tort and could not be united with other counts in tort.

Held: That the count was unmistakably in tort.

14. PLEADING—*Declaration—Tort or Contract.*—There is no question of a plaintiff's right to waive a contract and sue in tort for damages for breach of contract.

15. PHYSICIANS AND SURGEONS—*Malpractice—Result of Treatment as Evidence.*—In an action for malpractice it was objected to certain instructions that thereby the jury were allowed to give some weight to the result of the treatment along with all the other facts and circumstances proven in the case, in determining whether the defendant possessed and used proper professional skill, whereas defendant contended that no weight whatever, however slight, could properly be given to a bad result as evidence of the unskilfulness, or of the negligence of defendant.

Held: That defendant's position was untenable. While it is true that the result, however bad, is, *of itself alone,* insufficient evidence to establish the unskilfulness or the negligence of a physician in such a case as that at bar, yet it is not true that no weight whatever, "however slight," can be given to a bad result in such a case.

16. APPEAL AND ERROR—*Conflicting Evidence.*—In considering an assignment of error that the trial court erred in its refusal to

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set aside the verdict and grant the defendant a new trial, the Supreme Court of Appeals cannot enter upon any attempt to reconcile the conflicts in the evidence, its sole function being to determine whether the record discloses sufficient evidence of probative value to support the verdict, if such evidence was found credible by the jury.

17. PHYSICIANS AND SURGEONS—*Malpractice—Expert and Opinion Evidence.*—In an action for malpractice, the standards of professional skill and care by which the evidence as to the competency and the conduct of the defendant was to be measured, involved the highly specialized art of the treatment of eczema by X-rays, and in so far as they did so, expert testimony before the jury fixing such standards was essential to the support of the verdict of the jury; since otherwise the jury, to the extent of the questions involving such specialized art, would have had no standard in mind by which to measure the other facts proven in the case.

18. PHYSICIANS AND SURGEONS—*Malpractice—Sufficiency of Evidence.*—In an action for malpractice plaintiff is not required to exclude by his proof the possibility of the result complained of having been due to causes for which the defendant was not responsible. If there is sufficient evidence, the credibility and weight of which is for the jury, tending to show that the bad result was more probably due to lack of skill or negligence of the defendant, it is enough.

19. PHYSICIANS AND SURGEONS—*Malpractice—Sufficiency of Evidence.*—If the proof leaves it equally probable that the bad result complained of may have been due to a cause or causes for which the defendant was not responsible, as to a cause or causes for which he was responsible, the plaintiff cannot recover.

20. EXPERT AND OPINION EVIDENCE—*X-Ray—Who is an Expert.*—A general practitioner of exceptionally high standing in his profession, who had used the X-ray to make photographs, but had never used it curatively, who had had personal experience and knowledge of ulcers caused by X-rays, and from his professional training and reading of scientific books treating of X-rays and the results of their curative use, had a certain degree of knowledge on the subject of the proper curative use of X-rays, which he disclosed to the jury, is qualified to testify on the subject of the general professional standard of skill and care requisite in giving X-ray treatments.

21. VARIANCE—*Larger Proof may Include the Smaller.*—It does not follow because testimony exceeds in its effect what it is incumbent on the party introducing it to prove, that it is inadmissible, or does not tend to prove a lesser issue of fact. The

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larger proof may include proof of the lesser issue of fact; as, if it were alleged that A did not injure B in a certain personal encounter between them at a certain time and place, and the proof should be that no personal encounter ever occurred between A and B. So in the instant case the allegation of the declaration was not that for the defendant to prescribe and apply any X-ray treatment whatever for the eczema of plaintiff was malpractice; but only that to prescribe and apply a certain X-ray treatment which was in fact applied was malpractice. But proof of the former would necessarily include proof of the latter fact.

Error to a judgment of the Court of Law and Chancery of city of Norfolk, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

This is an action of trespass on the case by the defendant in error, plaintiff in the court below (hereinafter referred to as plaintiff), against the plaintiff in error (hereinafter referred to as defendant) for damages alleged to have been occasioned to the plaintiff by malpractice of the defendant, a physician, in and about the diagnosis of the disease of eczema with which the legs and ankles of the plaintiff were affected, the treatment thereof with X-rays by means of a certain electrical instrument or appliance; the lack of proper treatment and the treatment thereof with salves, etc.

The amended declaration (which alone need be considered) contains six counts. The malpractice alleged in the several counts, briefly stated, was as follows:

(a) In the *first count* it is alleged that the defendant "*did not possess and use reasonably sufficient knowledge and experience as to the nature and character of the said eczema* to enable him to prescribe and apply the treatment and remedies which the same reasonably required; and by

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reason thereof *did prescribe and employ an X-ray or X-ray treatment therefor,* which was *wholly improper, inappropriate* and *hurtful in the treatment of the said eczema with which his, the said plaintiff's legs and ankles were affected, in that,* in so treating the same for the plaintiff, he, the *defendant,* subjected them to the influence of certain rays of light, so produced by an electric current, *which was too powerful for proper use on that occasion;* and did place and apply such electrical instrument or appliance too close to the plaintiff's said legs and ankles; and did subject the plaintiff's said legs and ankles to the influence of said X-rays produced by said instrument or appliance for an unreasonably long time and did subject the plaintiff's said legs and ankles to the influence of said X-rays too often, in each of which particulars *the said X-rays* or *X-ray treatment,* which the said defendant used and employed, *was wholly improper, inappropriate and hurtful* for the treatment of the eczema with which the plaintiff's said legs and ankles were affected." (Italics supplied.)

(b) In the *second count* it is alleged that the defendant *carelessly and negligently failed to exercise due and reasonable care and skill,* such as the nature of the plaintiff's disease and the character and nature of the instrument and appliance which was used by the defendant in administering the said X-ray or X-ray treatment to the plaintiff's said legs and ankles reasonably required, in this, to-wit: That he *did carelessly and negligently subject them* to the influence of certain rays of light so produced by an electric current which was too powerful for proper use on that occasion, and *did carelessly* and negligently place and apply such * * * X-rays * * * "*so* produced" * * *, and "by reason of each of the said acts and conduct on the part of the defendant, the said treatment *so administered,* became and was dangerous when used and applied to the plaintiff's said legs and ankles * * * and * * * was wholly im-

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proper, inappropriate and hurtful for the treatment of the eczema with which the plaintiff's said legs and ankles were affected." (Italics supplied.)

(c) In the *third count* it is alleged that the defendant "*did not possess and apply reasonably sufficient knowledge and experience, care* and *skill to anticipate* and *foresee the probable effect* which the application of the said X-ray or X-ray treatment as used by him upon the plaintiff's legs and ankles would produce, *and to apply* reasonably proper and appropriate *prescriptions, medicines* and *remedies thereto, after using the same* as aforesaid, in order to prevent them from being burned, and the flesh and skin to which said X-ray was so applied from being destroyed, and in order to prevent ulcers, sores and other injuries from resulting therefrom; but, on the contrary, *by reason thereof,* did *fail to* reasonably *anticipate and foresee the probable effect which the said X-ray or X-ray treatment* as used and employed by him upon the plaintiff's legs and ankles *would produce,* and, by *reason thereof,* did *fail to apply* reasonably *proper* and *appropriate medicines, preventatives* and *remedies* thereto, *after the same had been used and employed by him,* to prevent the skin and flesh to which the said X-ray or X-ray treatment was so applied by the defendant, from being destroyed, and to prevent ulcers, sores and other injuries resulting therefrom." (Italics supplied.)

(d) In the *fourth count,* in addition to the charges that the defendant *did not possess* and *use* reasonable knowledge, experience, care and skill in recognizing and understanding *the effect* which the said X-ray or X-ray treatment *had produced,* and by reason thereof *failed* to prescribe and use such reasonably proper and appropriate medicines and remedies as from time to time their condition required, the allegation is added that, by reason of such lack of possession and use of such knowledge, experience, care and skill, the defendant "*did prescribe* from time to time *wholly im-*

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proper, inappropriate and *hurtful* medicines and so-called remedies, *being two certain salves, which were prescribed by and are known to him,* each of which were wholly unsuited to the condition of the plaintiff's said legs and ankles, but, on the contrary, were calculated to produce and did produce further injuries thereto." (Italics supplied.)

(e) In the *fifth count* it is alleged "that the blood, skin and flesh of some persons are more susceptible to the influence of the X-ray than are the blood, skin and flesh of other persons, and the same treatment for the same disease will affect some persons beneficially, while other persons will be greatly burned and injured thereby. Wherefore, in the use and application of the said X-ray treatment, there are required special and peculiar knowledge and experience as to when such treatment is proper, and as to the manner of using the said instrument or appliance when the same is used; and that special and peculiar care and skill are required in applying and using it, in order to successfully operate and apply the same; and peculiar and special knowledge as to the effect of the application and use of the said electrical treatment or appliance and as to the proper treatment of the plaintiff after the application thereof, are required, and to that end in the exercise of ordinary care it became the defendant's duty to make careful preliminary tests and examination of the physicial condition of the patient, and the parts to be treated before applying the X-ray treatment thereto, in order to ascertain their susceptibility to its influence, and to determine the correct treatment therefor, and to successfully prevent injurious, instead of beneficial, results from its use; and unless such knowledge and experience, care and skill *are employed* in the use and application thereof, and unless the physician using the same *has made such preliminary tests and examination* and acquired such peculiar and special knowledge and experience as to the effect which said treatment

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will probably produce upon the patient, and *unless such peculiar knowledge and experience, care and skill are employed* in applying said treatment, there is great danger and strong probability that the parts of the patient's body to which the same is applied will become so burned and affected that the skin and flesh will be destroyed, and great sores, ulcers and disease will result therefrom, all of which (by the exercise of ordinary care and skill on his part) was known, or should have been known to the defendant, and that the defendant "did carelessly and negligently *fail* and *neglect* to *make such a test* or *examination as in the exercise of ordinary care it was his duty to make* of his said legs and ankles before applying the said X-ray treatment thereto, in order to ascertain their susceptibility to its influence and to determine the correct treatment thereof, and to successfully prevent injurious instead of beneficial results from its use, but did carelessly and negligently subject them to the influence of certain rays of light so produced by an electric current which were unsuited and inappropriate as a remedy for the plaintiff's said legs and ankles *in their then condition,* and did, in view of the condition of the plaintiff's skin, flesh and blood *at that time,* and *their susceptibility to the influence of said X-ray treatment,* carelessly and negligently place and apply said electrical instrument or appliance so close to the said plaintiff's said legs and ankles and did subject them to the influence of said X-ray so produced by said instrument or appliance for an unreasonably long time, and did subject them to the influence of said X-rays too long." (Italics supplied.)

(f) In the *sixth count* it is alleged that the plaintiff consulted the said defendant as a physician *regarding said eczema and as to the proper treatment therefor;* * * * that thereupon it became and was the duty of the defendant to possess and use reasonable knowledge, experience, care and skill in recognizing and understanding the effect which

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the remedies and treatment prescribed and used by him would probably produce." This count then makes the same allegation as the fifth count as to some persons being more susceptible to the influence of X-rays than others, and alleges that by reason of which "there is great danger that as a result of the use of the X-ray treatment unforeseen injuries will be sustained thereby, and that the parts of the patient's body to which the same are applied will become so burned and affected that the skin and flesh will be destroyed and great sores, ulcers and disease will result therefrom, *all of which was well known, or should have been well known to the defendant;*" and further alleges that the foregoing being true, thereupon, "in the exercise of ordinary care, it became and was the duty of the defendant *to make known to the said plaintiff the danger aforesaid* and *not to mislead him;*" * * * "that *had the defendant made known to him* (the plaintiff) *the effect aforesaid,* and *that such injuries might result therefrom,* he would *not have permitted the treatment to be applied* to his said legs and ankles, and the injuries hereinafter complained of would not have occurred;" that "yet, the said defendant * * * did carelessly and negligently *fail* and *neglect to make known to the plaintiff the nature* and *character of the said X-ray treatment in such cases and the uncertainty which existed as to the result thereof* and *the danger of the injuries which might be caused thereby,* in order that he might determine whether he would permit his said legs and ankles to be subjected thereto, but, on the contrary, *assured the plaintiff that the said X-ray treatment would be beneficial* to his said legs and ankles, *and that* if he applied the same thereto *his said eczema would be cured* and his legs and ankles *would be well within a short time, to-wit, eight weeks.* And *without giving the plaintiff any notice or warning* of the said uncertainties and dangers which attended such treatment, did carelessly and negligently subject them to the influence of

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said rays of light * * * which were unsuited and inappropriate as a remedy for the plaintiff's said legs and ankles in their then condition, and did, in view of the condition of plaintiff's skin, flesh and blood at that time, and the susceptibility to the influence of the said X-ray treatment, carelessly and negligently place and apply said electrical instrument or appliance too close to the plaintiff's said legs and ankles, and did subject them to the influence of the said X-ray * * * too frequently and for an unreasonably long time." (Italics supplied.)

The declaration alleges the following injuries as resulting from the malpractice of the defendant alleged in the several counts aforesaid, namely:

"By reason whereof the said legs and ankles of the plaintiff were greatly and badly burned by the said defendant, large portions of the skin and flesh to which the said X-ray or X-ray treatment were applied, were destroyed, large and malignant ulcers and sores were formed thereby upon his said legs and ankles, the plaintiff was rendered liable to contract other and permanent afflictions therefrom, and was thereby greatly and permanently hurt, maimed and injured, and has suffered and undergone great pain and anguish of body and mind, and has so continued for a long space of time, to-wit, hitherto, and will so continue during his natural life; and by reason thereof has been and will hereafter be prevented from following his usual and customary business, trade and calling; and has been, and will be hereafter deprived of and prevented from making and earning divers large sums of money, which he could have acquired, earned and made but for his said injuries; and has been compelled to expend and has expended divers large sums of money, to-wit: $1,000 in and about endeavoring to get cured and healed of his said injuries, and will hereafter during his life be compelled to expend large sums of money in and about endeavoring to get cured and healed of the same."

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The defendant demurred to the declaration and to each count thereof. The demurrer was overruled by the trial court. As to the demurrer, only the action of such court in overruling the demurrer to the third, fourth, fifth and sixth counts is assigned as error.

The following were the only instructions complained of:

PLAINTIFF'S INSTRUCTION, NO. 2.

"The court instructs the jury that if they believe from the evidence that the injuries of which the plaintiff complains were the direct and proximate result of X-ray burns inflicted upon him by the defendant in treating his legs and ankles, and if they further believe from the evidence that when proper instrumentalities and proper care are used in the application of the X-ray treatment of such cases as that of the plaintiff, such burns as were inflicted upon the plaintiff's legs and ankles and the injuries resulting therefrom, are not a natural and probable result thereof, then the fact that the plaintiff was so burned, and that said injuries did result therefrom, may be taken into consideration by you along with all the other facts and circumstances proven in the case, in determining whether the defendant possessed the knowledge, skill and judgment which the law required of him when he so treated the plaintiff's legs and ankles, and whether, in the application of his knowledge, skill and judgment, he measured up to the standard required of him by law in treating him."

INSTRUCTION GIVEN BY THE COURT AT ITS OWN INSTANCE.

"The court instructs the jury that the fact that after the plaintiff was treated with the X-ray by the defendant ulcers appeared on his legs does not of itself alone entitle the plaintiff to recover; and the jury are instructed that they shall

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find for the defendant unless the plaintiff has shown by a preponderance of the evidence that the ulcers were caused by the negligence of the defendant, or his lack of skill, or his failure to apply the same."

There was a verdict of the jury in favor of the plaintiff. There was a motion by the defendant to set such verdict aside, which was overruled and thereupon judgment for the plaintiff was entered by the order complained of and such action of the court below is made the basis of the remaining assignment of error.

Loyall, Taylor & White and *Thos. H. Willcox,* for the plaintiff in error.

Jeffries & Jeffries and *Tazewell Taylor,* for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

1. ON THE SUBJECT OF THE DEMURRER.

As noted above only the action of the court below in overruling the demurrer to the third, fourth, fifth and sixth counts of the amended declaration is assigned as error.

No grounds of demurrer were stated specifically before the trial court as to the fifth or sixth counts. The grounds of demurrer there stated as to the third and fourth counts were as follows:

"As to the third count: Because it does not state what were the reasonably proper and appropriate medicines, preventatives and remedies which should have been used, in accordance with the allegations of said count, by the defendant after he had used and employed the X-ray or X-ray treatment.

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"As to the fourth count: Because it does not state what were the reasonably proper and appropriate medicines and remedies which the defendant failed to apply to the plaintiff, as alleged in the declaration, from time to time, as the condition of his legs required, and because the count does not state what were the 'two certain salves' which were prescribed by the defendant, according to the allegations in said count and which were according to said allegations wholly unsuited to the condition of the plaintiff's legs and ankles."

The same grounds of demurrer are urged in the assignments of error before us touching the action of the court below in overruling the demurrer to the third and fourth counts of the declaration.

It will be observed from the above statement of the allegations of the third and fourth counts that the gist of the charges in those counts were as follows:

(a) In the third count the charge is that the defendant did not *possess and use* that degree of knowledge, experience, care and skill to diagnose and treat the disease of the plaintiff which the law imposed upon the defendant under the circumstances alleged, and that the defendant was at fault because of his failure to use such degree of knowledge, experience, care and skill. In other words, it charged that the defendant did not possess and use the ordinary competency which would have resulted from that degree of knowledge, experience, care and skill possessed by physicians in good standing in the same or similar communities with defendant who are specialists in the treatment of diseases by the use of X-rays in the light of the existing state of scientific knowledge on the subject. The count under consideration charges that the defendant was unskilful and negligent in the premises with the meaning aforesaid, but it does not stop with those allegations in a general way. It adds distinct, affirmative allegations of

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material facts sufficient to show in what the alleged unskilfulness and negligence charged consisted, to-wit, that *the unskilfulness* aforesaid consisted in this, that the defendant did not possess the ordinary competency aforesaid to anticipate and foresee the probable effect which the application of the said X-ray or X-ray treatment, as used by him upon the plaintiff's legs and ankles would produce; and that he did not possess such competency "to apply reasonably proper and appropriate prescriptions, medicines and remedies thereto," after applying the X-rays to the ankles and legs of plaintiff as he did; and that *the negligence* aforesaid consisted in this, that the defendant, after treating the legs and ankles with X-rays as he did, failed "to apply reasonably proper and appropriate medicines, preventatives and remedies thereto." Here are allegations of fact which sharply and distinctly raised the issues whether the defendant was professionally unskilful and also negligent in the premises.

As we shall presently see, such issues of fact, in so far as they involved the highly specialized art of treatment of the disease of the plaintiff by X-rays, were to be decided, if they could be decided at all, only by the standard fixed by such evidence as might be furnished by experts on the subject. Such a case differs from an ordinary case of allegations of negligence, or other causes of action consisting of acts the nature and consequences of which are matters of common knowledge. Here the plaintiff, a layman, could not have had the knowledge of what specific "prescriptions, medicines and remedies" a physician possessing the ordinary competency aforesaid should not have failed to apply. If he had possessed that knowledge, he would have needed no physician. Whereas the defendant, if he possessed the ordinary competency aforesaid (the duty of which possession the law imposed upon him under the circumstances alleged), upon the charges of professional unskilfulness and negli-

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gence being made against him and alleged to consist of the lack of professional knowledge, experience, care and skill aforesaid and failure to apply reasonably proper "prescriptions, medicines and remedies" in the treatment aforesaid, would have known at once how to defend himself against such charges, by his own testimony and by the testimony of other experts on the subject.

The count we have under consideration, therefore, was sufficient in its allegations of material facts to inform the defendant of the nature and character of the demand against him and stated such facts as would enable the court to say, if the facts were proved as alleged, whether they established a good cause of action. Since the *Hortenstein Case*, 102 Va. 914, 47 S. E. 996, the rule in Virginia has been settled that where a declaration measures up to these requirements it is good on demurrer. (See *Virginia, etc., Wheel Co.* v. *Harris*, 103 Va. at page 712, 49 S. E. 991, and cases cited.) Allegations in a declaration, which go beyond these requirements by descending into statements of details of proof, are unnecessary. If a declaration gives the defendant partial but not complete notice of the nature and character of the plaintiff's claim, a bill of particulars may be required of the latter. But, on the point under review, the count we are considering gave the defendant complete notice of the nature and character of the professional unskilfulness and negligence charged by the plaintiff against the defendant. Whether this or that specific prescription, medicine or remedy should have been applied or not applied was a mere matter of evidence upon the issue of fact on the allegations of unskilfulness and negligence made by such count. To require a declaration to allege such details of evidence would be to depart from the rule established in Virginia on this subject.

(b) In the fourth count there are charges in general terms to the effect that the defendant was unskilful and

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negligent, and among the allegations of fact constituting such unskilfulness and negligence is the allegation that the defendant "did prescribe from time to time wholly improper, unappropriate and hurtful medicines and so-called remedies, *being two certain salves, which were prescribed by and are known to him,* each of which were wholly unsuited to the condition of the plaintiff's said legs and ankles, but, on the contrary, were calculated to produce and did produce further injuries thereto."

For the reasons stated above, in our consideration of the third count, we are of opinion that the fourth count was also good on demurrer. In regard to the specific allegations that "two certain salves, which were prescribed by and are known" to the defendant, were prescribed by the latter, it is deemed sufficient to say that, as indicated above, the count would have been good on demurrer if it had left out this specific allegation. That was a descent into an allegation of a matter of evidence and may be considered as surplusage. Further, as an allegation of fact it was sufficient to inform the defendant of the nature and character of the two salves, since it is alleged that they "were prescribed by and were known to him." This prevented his being taken by surprise by proof of his having prescribed such two salves.

While the objections to the fifth and sixth counts made in the assignments of error do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, it does not appear from the record that any motion was there made by the plaintiff to require or that the court on its own motion required the grounds of demurrer relied on to be stated (section 3271, Code of Virginia). For this reason and also because no objection is made by plaintiff to our consideration of the assignments of error as to such fifth and sixth counts, we will proceed to consider such assignments.

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(c) Three grounds are stated by defendant in the assignments of error and urged on demurrer against the fifth count, which will be considered in their order as set forth below:

(1.) That the standard by which the duty of the defendant to make the preliminary tests and examination of the patient before subjecting him to the X-ray treatment had to be tested was whether other like specialists in good standing, in the same or similar localities as defendant, would have been guilty of the omission to make such preliminary tests and examination; hence, that this count was fatally defective in that it did not allege that other such specialists would not have been guilty of such omission.

In regard to this position it is deemed sufficient here to say that defendant is correct as to the standard by which the duty in question had to be tested. But under the allegations of the count as it stands, that test had to be applied by measuring the evidence, as it might be introduced on the trial, by the standard fixed by the testimony of experts on the subject (since the standard mentioned involved a highly specialized art of treatment). That standard was what such specialists would or would not have omitted to do under the circumstances alleged. An express allegation in the count that other such specialists would not have been guilty of said omission was unnecessary. Such allegation was in substance and effect contained in the allegations of the count as it stands. The failure of the count to contain such express allegation did not deprive the defendant of his right to require the same character of proof on the subject as he was entitled to require if such express allegation had been contained in the count. Hence, there is no merit in this objection.

(2.) That this count is demurrable because it did not allege in detail what test and examination should have been made of the plaintiff before the application of the X-ray—

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whether of the heart, of the blood-pressure, of the skin viewed microscopically, of the pulse, of the digestive organs, of the circulation, etc.

The count, however, alleged the failure of the defendant "to make such a test or examination as in the exercise of ordinary care it was his duty to make" under the circumstances alleged. This was a sufficient allegation to raise the distinct issue whether the defendant was professionally unskillful and negligent in this matter. It gave the defendant information of the nature and character of the charge against him and otherwise measured up to the requirement of the established rule on the subject of what allegations of fact are necessary in a declaration, above mentioned. The details as to whether this or that particular test and examination should have been made, were mere matters of evidence. Hence, there is no merit in this objection.

(3.) That this count is demurrable because it failed to allege, except perhaps inferentially, that the plaintiff was in fact more susceptible to the influence of X-rays than are other persons, and that had such tests and examinations been made by defendant as it is alleged he should have made, it would have resulted in any discovery of such susceptibility of the legs and ankles of the plaintiff.

We are of opnion that this point is well taken. This was a necessary allegation of fact under this count of the declaration to show a right of action of the plaintiff upon the issue thereby tendered. Such allegation should have been made and distinctly made, with definiteness and certainty. An inferential allegation of such material fact was insufficient. *Eaton* v. *Moore*, 111 Va., at page 403, 69 S. E. 326.

For the latter reason, we are of opinion that the fifth count was bad on demurrer and that the trial court erred in overruling the demurrer to such count. But, as we shall presently see, upon the trial the case did not turn upon the existence of any peculiar susceptibility of the plaintiff to

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X-rays; there was no evidence that such susceptibility in fact existed; the proof to sustain the verdict was of a different character and the verdict was necessarily based upon other grounds. Therefore, the error mentioned appears from the record to have been harmless and hence was not reversible error.

(d) There are only two grounds of the assignments of error with respect to the action of the trial court in overruling the demurrer to the sixth count, which are insisted upon by the defendant. These will be considered in their order as stated below.

(1.) That the count is based on the allegation that it is the duty of a physician in the exercise of ordinary care to warn a patient of the danger of possible bad consequences of using a remedy; and that this is not *per se* an act of negligence.

The latter position is correct. The count under consideration, however, does not negative the correctness of such position. It does not depend upon an allegation that the duty to warn in question exists in all cases. The count alleges that in the instant case the plaintiff "consulted the said defendant as a physician regarding said eczema and as to the proper treatment therefor;" that, in substance, the defendant then well knew, or by the exercise of ordinary skill and forethought should have well known of the danger aforesaid; that notwithstanding this situation the defendant *misled* the plaintiff by not only not giving him the warning aforesaid, but by affirmatively assuring him that if the defendant applied the X-ray treatment to the plaintiff's legs and ankles "his eczema would be cured and his legs and ankles would be well within a short time, to-wit, eight weeks." This count also contains the allegation that had the defendant given the plaintiff the warning aforesaid the latter would not have submitted to the treatment of the X-rays. In such a situation we are of opinion that the

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count stated a good cause of action against the defendant for giving, not a mere opinion, but the positive assurance of cure alleged. Hence, we do not find any merit in this objection.

(2.) That if the foregoing position be correct, the count is based upon a breach of contract as giving the right of action, in which case it sounds in contract and not in tort and cannot be united in this action with other counts in tort.

It is deemed sufficient to say in regard to this position that the count under consideration is unmistakably in tort. Of course there can be no question upon elementary principles of a plaintiff's right to waive a contract and sue in tort for damages for breach of contract. This was what was done by this count in accordance with its allegations. Hence, we find no merit in this objection.

Our conclusion is, therefore, with hespect to the assignments of error touching the action of the trial court in overruling the demurrer, that there was no error in such action, except with respect to the fifth count of the declaration, and that that action was harmless error, as above stated.

2. We come now to the consideration of the assignments of error with respect to the instructions. They will be considered in their order as stated below.

(1.) In regard to plaintiff's instruction No. 3, and the instruction given by the court at its own instance:

These instructions are copied above.

But one and the same objection is urged by the defendant to both of these instructions, and that is, that the jury were allowed thereby to give *some* weight to the *result* alleged *"along with all the other facts and circumstances proven in the case,* in determining whether the defendant possessed the knowledge, skill and judgment which the law required of him when he treated * * * the plaintiff's legs and

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ankles, and whether, in the application of his knowledge, skill and judgment, he measured up to the standard required of him by law in treating" the plaintiff. Whereas, it is contended by defendant that no weight whatever, "however slight," could properly be given to a "bad result" as evidence of the unskilfulness, or of the negligence, alleged in the declaration against the defendant.

A great number of authorities are cited and relied on by the able counsel for the defendant to sustain the position last above stated. A careful examination of all of them discloses, however, that none of them holds that no weight whatever, "however slight," is to be given to a bad result in a case such as that before us. The extent of their holding is that the result, however bad, is, *of itself alone*, insufficient evidence to establish the unskilfulness or the negligence of a physician in such a case as that in judgment. See the following cases cited and relied on by defendant: *Ewing* v. *Goode* (C. C.), 78 Fed. 442, in which Judge Taft delivered the opinion of the court; *McGraw* v. *Kerr*, 23 Colo. App. 163, 128 Pac. 870; *Miller* v. *Toles*, 183 Mich. 252, 150 N. W. 118, L. R. A. 1915 C, 595; *Stalock* v. *Holm*, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712; *Sheldon* v. *Wright*, 80 Vt. 298, 67 Atl. 807; *Phebus* v. *Mather*, 181 Ill. App. 274; *Moline* v. *Christie*, 180 Ill. App. 334; *Adolay* v. *Miller*, 60 Ind. App. 656, 111 N. E. 313; *Pettigrew* v. *Lewis*, 46 Kan. 78, 26 Pac. 458; *Feeney* v. *Spalding*, 89 Me. 111, 35 Atl. 1027; *Wood* v. *Wyeth*, 106 App. Div. 21, 94 N. Y. Supp. 360; *Bigney* v. *Fisher*, 26 R. I. 402, 59 Atl. 72; *Norkett* v. *Martin* (Colo.), 165 Pac. 256; *Dishman* v. *North Pacific Benefit Asso.*, 96 Wash. 182, 164 Pac. 943; *Sweeney* v. *Erving*, 35 App. Cas. (D. C.) 57, 47 L. R. A. (N. S.) 734; *Baker* v. *Hancock*, 29 Ind. App. 456, 63 N. E. 323, 64 N. E. 38; *Dye* v. *Corbin*, 59 W. Va. 266, 53 S. E. 147; *Lawson* v. *Conaway*, 37 W. Va. 159, 16 S. E. 564. 18 L. R. A. 627, 38 Am. St. Rep. 17; *Robinson* v. *Crotwell*, 175 Ala. 194, 57 So. 23.

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The principle upon which the holding referred to rests is correctly stated in those authorities.

As said by Judge Taft, in the case of *Ewing* v. *Goode, supra* (C. C.), 78 Fed. 442: "* * * where a case concerns (a) highly specialized art * * * with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

And in the opinion of the court in *McGraw* v. *Kerr, supra,* 23 Colo. App. 171, 128 Pac. 873, it is said: "The authorities are practically unanimous in holding * * * that as to what is or is not proper practice in examination and treatment, or the usual practice and treatment, is a question for experts, and can be established only by their testimony. * * * In *Jackson* v. *Burnham, supra,* 1 Colo. App. 237 [28 Pac. 250], the court * * * said that in order to determine whether the defendant (a surgeon) exercised ordinary care and skill in examining the case, as well as in applying remedies thereafter, resort must be had to the opinion of experts, based upon the ultimate facts as the jury may find them established by the weight of the evidence. The only rule asked for in the language of the instruction now under consideration is that, upon the question of standard by which the jury must be guided in arriving at a conclusion as to what constituted care and skill, the testimony of experts (in this case the physicians) alone must be considered. The standard and the testimony by which it can be ascertained are the only matters involved. Upon that question we think there is no contrariety of opinion. If no standard was established by the testimony of physicians, then the jury had no standard."

But the opinion last quoted correctly adds: "This does not militate against the right of the jury to decide between

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conflicting testimony of different physicians or experts on the question of a standard; it only goes to the extent that, if in doubt upon the matter necessary to enable the jury to say that a standard has been fixed for its guidance by the testimony of such qualified witnesses, then it cannot from other incompetent evidence raise a standard."

Now, in the instant case, as will be hereinafter more particularly noted, there was expert evidence in behalf of the plaintiff, and also furnished by defendant, on the question of what was the standard of professional skill and care by which the competence and conduct of the defendant was to be measured; and there were the ultimate facts upon which this expert evidence was based as the jury might find them to be from a preponderance of all the evidence. Therefore it was a case in which the result aforesaid was properly to be considered by the jury along with all the other facts and circumstances proven in the case.

It is true that in the case of *Ewing* v. *Goode, supra* (C. C.), 78 Fed. 442, the opinion of Judge Taft uses the following language quoted in the petition of defendant, namely:

"If the maxim of *res ipsa loquitur* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly 'all the ills that flesh is heir to.'"

But subsequent portions of the opinion of Judge Taft in that case expressly set forth that he considered that a bad result in such a case was some evidence of the unskilfulness or negligence of the physician. The opinion concedes that such a result, of itself alone, is a "scintilla of evidence" of such unskilfulness or negligence; but holds that as the scintilla doctrine is not followed in federal courts, the inquiry before the court in that case was: "Does the

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case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant or injury caused thereby." The opinion thereupon holds, in substance, that there was, aside from the result, no evidence whatever for the plaintiff of negligence or unskilfulness of the defendant in the manner of the performance of the operation by him or in his treatment; and that the sole addition to the scintilla of evidence afforded by the unfavorable result of the operation was the negligence of the defendant's office girl. (The opinion then proceeds to show that the defendant was not liable for the latter negligence.)

There was no expert evidence whatever in favor of the plaintiff in the case last cited, nor any evidence tending to show that on applying the standard fixed by the expert evidence in the case that there was any unskilfulness or negligence on the part of the defendant. In most of the other cases next above cited, either there was no expert testimony for the plaintiff or no sufficient evidence on applying the standard fixed thereby that there was unskilfulness or negligence on the part of the defendant, or the expert testimony showed that the injury complained of with equal probability might have resulted from some cause for which the defendant was not responsible as from a cause for which he was responsible.

In the cases of *McGraw* v. *Kerr*, *supra*, 23 Colo. App. 163, 128 Pac. 873, and *Sheldon* v. *Wright*, *supra*, 80 Vt. 298, 67 Atl. 807, however, the testimony of the experts (physicians) testifying for plaintiff and defendant was conflicting. We have quoted above from the former; the following is said in the latter case:

"The conclusions of the experts were conflicting. If some were right others were necessarily wrong. The jury were left to determine the matters upon the whole evidence, and this course was entirely right, as, in any view, the strictly expert evidence was without value, except as it was based

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upon facts which the jury might find from other evidence. The ordinary witness testifies to facts about which the jurymen have or should have no knowledge of their own; but, nevertheless, they must apply their own good judgment to the testimony of such witnesses in determining what facts are proved. The expert, in a case like this, testifies to facts of a different class, or to the interpretation of facts, matters for the most part about which the jury are not expected to have knowledge of their own; but, nevertheless, they must apply their sound judgment to the comparison, sifting and weighing of such testimony and to a consideration of the sources from which it comes."

Among the instructions held in the latter case to have been properly refused was the following. An instruction "that the results of defendant's treatment of plaintiff's leg are in themselves alone not the slightest evidence of defendant's negligence or want of skill." With reference to that instruction the appellate court in that case said: "* * * the evidence as to the results of the treatment did not stand alone, but was inextricably woven in with a large amount of medical and other testimony and was so connected with the rest of the testimony that it has to be weighed therewith." Accordingly the court in that case held that it was proper for the jury to consider the result of the treatment along with the expert testimony and other facts and circumstances proven in the case.

Hence, we are of opinion that there was no error in the action of the trial court in the instant case in giving the instructions objected to by the defendant.

We are strengthened in our view of the correctness of this conclusion by a consideration of the following authorities cited and relied on by the plaintiff: *Kopecky* v. *Hasek Bros.* (Iowa), 162 N. W. 828; *Shockley* v. *Tucker*, 127 Iowa, 456, 103 N. W. 360; *George* v. *Shannon*, 92 Kan. 801, 142 Pac. 967, Ann. Cas. 1916 B, 338.

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3. This brings us to the consideration of the remaining assignment, which is, that the trial court erred in its refusal to set aside the verdict and grant the defendant a new trial.

In considering this assignment of error we, of course, cannot enter upon any attempt to reconcile the conflicts in the evidence, of which there are very many. Our sole function is to determine whether the record discloses sufficient evidence of probative value to support the verdict, if such evidence was found credible by the jury.

Now it should be borne in mind that the case in judgment involves two standards of professional skill and care by which the evidence as to the competency and the conduct of the defendant is to be measured—one standard having reference to the technique or mechanical operation of the X-ray apparatus—the other standard having reference to the possession and use of the professional skill and care incumbent upon the defendant with respect to the diagnosis and treatment of the disease of the plaintiff in matters other than the mere mechanical operation of said apparatus. For the sake of brevity, the former will be hereinafter referred to as the mechanical standard and the latter as the general professional standard of skill and care.

The two standards mentioned both involve, in the instant case, the highly specialized art of the treatment of the disease of the plaintiff by X-rays, and, as appears from the authorities cited above, in so far as they do so, expert testimony before the jury fixing such standards was essential to the support of the verdict of the jury; since otherwise the jury, to the extent of the questions involving such specialized art, would have had no standard in mind by which to measure the other facts proven in the case.

Now, as to the mechanical standard of skill and care, there was no expert evidence in the case except the testimony of the defendant and of other expert witnesses for the defendant; but there was sufficient evidence in the case,

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when measured by the mechanical standard fixed by the testimony for defendant, to support the verdict of the jury, certainly, upon the issues joined on the first and second counts of the declaration. It is deemed sufficient to mention only the following details of such evidence, namely: There was evidence in the case to the effect that the defendant did not keep an accurate record of the X-ray treatment or any record of the exact "dose" of X-rays in fact applied in the several treatments therewith; that if the standard "dose" only had been applied it was extremely improbable that any bad result would have been caused; that the defendant indeed, *ante motem litem*, took the positive position that such result could not have been caused by the X-ray treatments; that the defendant testified on a former trial of the case, and, in effect, on the trial under review, that such result was not a natural and probable result of the application of such treatments in standard doses; that his expert witnesses all so testified; the cross-examination of the defendant also tended to show that his memory of the "dose" aforesaid applied by him in the several treatments aforesaid was not to be relied on; there were inconsistent statements made by the defendant at different times as to his opinion of the causes of the bad result; and there was other evidence to support a conclusion of the jury that the "dose" aforesaid, in fact applied as aforesaid, was not in accordance with the mechanical standard fixed by the expert testimony of the defendant himself.

It is true that such testimony did not show that the bad result might not have happened without fault of the defendant; but there was sufficient of such evidence, the credibility and weight of which was for the jury, tending to show that the bad result was more probably due to lack of skill or negligence of the defendant as charged in the counts of the declaration other than the fifth count.

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This degree of proof is all that is required of a plaintiff in a civil case. He is not required to exclude by his proof the possibility of the result complained of having been due to causes for which the defendant is not responsible.

It is true that if the proof leaves it equally probable that the bad result complained of may have been due to a cause or causes for which the defendant was not responsible, as to a cause or causes for which he was responsible, the plaintiff cannot recover. *Norfolk & Western Ry. Co.* v. *Cromer*, 101 Va. 671, 44 S. E. 898; *Norfolk & Western Ry. Co.* v. *McDonald*, 106 Va. 207, 55 S. E. 554; *Clinchfield Coal Corp.* v. *Cruise*, 117 Va. 645, 86 S. E. 135; *Consumer's Brewing Co.* v. *Doyle*, 102 Va. 402, 46 S. E. 390; cited by defendant. But such is not the instant case.

As to the general professional standard of skill and care, the plaintiff introduced one expert witness only, Dr. McCormick. The evidence, without conflict, shows that he is a general practitioner of exceptionally high standing in the profession; that he had used the X-ray to take photographs; that he had never used the X-ray curatively, but had had personal experience and knowledge of ulcers caused by X-rays, and from his professional training and reading of scientific books treating of X-rays and the results of their curative use, had a certain degree of knowledge on the subject of the proper curative use of X-rays, which he disclosed to the jury. He expressly declined to testify as an expert upon the subject of the mechanical standard aforesaid. We are of opinion that his testimony was undoubtedly admissible on the former subject, and that its credibility and weight were for the jury. *Arminius Chemical Co.* v. *Landrum*, 113 Va. 7, 21, 73 S. E. 459, 38 L. R. A. (N. S.) 272, Ann. Cas. 1913 D, 1075; 1 Wigmore on Evidence, sections 555-569, 665, 687.

There was, therefore, expert evidence in behalf of the plaintiff in the instant case on the subject of the general professional standard of skill and care aforesaid.

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It is true there was sharp conflict between the testimony of Dr. McCormick and the expert testimony of the defendant himself and of the other expert testimony for defendant on certain points; on other points there was no conflict. It is true also that the defendant was shown by the evidence to be of the very highest character and professional standing, and his expert witnesses were the most eminent in this country. All this was before the jury. It would serve no useful purpose for us to set out here in detail the conflict or concurrence in such evidence, since the verdict of the jury concluded the facts involved therein. It is deemed sufficient to say that Dr. McCormick gave it as his positive and unqualified opinion that the injury complained of by the plaintiff was an "X-ray burn" and "could come only from the X-ray and nothing else;" that it was of "the severest degree;" that "this burn went down and involved the bone. I put my finger on the bone, and the membrane which covers the bone on both legs was burned, and the symptoms upon which I diagnosed that as a severe burn were a dirty, gray, dry slough, unlike any slough that you see in any other ulceration; the unusual hard gristly-like border to it, and the discoloration of the skin around the outside of the hard horny border." The expert testimony for defendant was to the effect that it cannot be told from a mere examination of an ulcer, even of this severe character, whether it was caused by X-rays; but they admitted that from such an examination, considered in the light of the history of the case, such diagnosis could be made with reasonable certainty. The evidence in the record is that Dr. McCormick based his diagnosis on such an examination in the light of the history of the plaintiff's case. And the expert testimony for defendant, to the effect that in their opinion the ulcers in question were not caused by X-rays, was based on the assumption that the X-ray "dose" was applied in accordance with the mechanical standard afore-

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said, whereas there was evidence in the case as aforesaid, tending to show that such standard was not in fact followed. The whole subject was before the jury. By their verdict they found the fact to be that the injury was caused by the X-rays, and that is conclusive upon us of that fact.

The cause of the injury being the X-rays was, however, but one element of fact in the case. As the jury were properly instructed (by instructions not drawn in question by the assignments of error and hence not copied above), if the defendant exercised ordinary care and skill in the premises, the plaintiff was not entitled to recover, although the injuries complained of were caused by the X-ray treatment; and the question still remained whether the defendant did or did not exercise such care and skill. On the latter question the expert testimony for the plaintiff of Dr. McCormick was positive to the effect, (1) that the action of the defendant in advising and applying the X-ray treatment for eczema to plaintiff's legs and ankles, in the condition they were at the time, did not measure up to the general professional standard of skill and care aforesaid—that in his opinion such treatment was not proper—in other words, that it was malpractice; and (2) Dr. McCormick's testimony tended to show that the application in fact made by the defendant was too frequent, and too strong, and so constituted malpractice according to the mechanical standard in evidence as aforesaid, and besides there was other evidence to the same effect as above noted. That is to say, there was sufficient evidence in the case, when measured by the general professional standard, as well as by the mechanical standard of skill and care aforesaid, to support the verdict of the jury upon the issues made by the first and second counts of the declaration.

The testimony of Dr. McCormick to the effect that the advising and applying the X-ray treatment for eczema for plaintiff's legs and ankles in the condition they were at the

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time was malpractice, tended to sustain, on behalf of the plaintiff, the issue joined on the first count of the declaration and was properly admissible in the case.

It is urged by defendant that the declaration did not make as broad an issue of fact as that testimony tended to prove; that, "It was claimed in the declaration that the X-ray was put too close, etc., but never that it was wrong to prescribe X-ray for the eczema with which the plaintiff was suffering." This position as to the allegations of the declaration is correct; but it does not follow because testimony exceeds in its effect what it is incumbent on the party introducing it to prove, that it is inadmissible, or does not tend to prove a lesser issue of fact. The larger proof may include proof of the lesser issue of fact; as, if it were alleged that A did not injure B in a certain personal encounter between them at a certain time and place, and the proof should be that no personal encounter ever occurred between A and B. So, *mutis mutandis*, in the instant case. The allegation of the first count of the declaration is not, indeed, that for the defendant to prescribe and apply any X-ray treatment whatever for the eczema of plaintiff was malpractice; but only that to prescribe and apply a certain X-ray treatment which was in fact applied was malpractice. But proof of the former would necessarily include proof of the latter fact.

And, further, the admission of such larger proof than needful, could not be the subject of any proper objection by the defendant, since it did not change the issue. The defendant had need still to maintain only on his part by a preponderance of the evidence that his actual prescription and application of X-rays was not malpractice.

Hence, we are of opinion that there is no merit in such position of defendant.

As above noted, there was no evidence in the case tending to show that the plaintiff was within the class of "some

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persons" alleged in the fifth count of the declaration to be more susceptible to X-rays than other persons. Dr. McCormick expressly declined to say that there was even such a class of persons. The expert witnesses for defendant differed on this subject. The most that any of them testified was that some of them stated that to some extent persons of a fair complexion were more susceptible to X-rays. But it was affirmatively proved that the plaintiff is a dark brunette in complexion. Hence, there was no evidence on this subject to support the fifth count of the declaration.

The same is true with respect to the sixth count of the declaration in so far as it is based upon the allegation of the peculiar susceptibility aforesaid of the plaintiff.

Whether there was sufficient proof to have sustained the verdict of the jury, if based on the other allegations of the sixth count, or on the allegations of the third and fourth counts of the declaration, it is unnecessary for us to decide, since, in view of our conclusions above, there was sufficient evidence to support the verdict based upon the first and second counts of the declaration, and since there was no error of the trial court in the giving of the instructions complained of, or in the admission of the testimony objected to, namely, that of Dr. McCormick.

For the foregoing reasons, we are of opinion to affirm the judgment complained of, which will be accordingly done.

Affirmed.

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Wytheville.

JEFFRIES AND OTHERS V. JEFFRIES', EXECUTOR AND OTHERS.

June 13, 1918.

1. INFANTS—*Appearance—Guardian Ad Litem.*—In an order reviving a suit, counsel for one of the defendants was appointed guardian *ad litem* for an infant, who was interested in the result of the suit. No answer was filed by him as guardian *ad litem*, but the decree ordering the revival was endorsed "seen" and signed by him, though nothing appeared to indicate that he signed it as guardian *ad litem*.

   Held: That this was not sufficient evidence of acceptance of the office of guardian *ad litem*, and certainly did not amount to an appearance of the infant by his guardian.

2. PARTIES—*Service of Process—Averments in Bill.*—A person cannot be made a party by simply naming him as a defendant and serving him with process. The bill must contain averments showing some cause for relief against him, else he is no party to the litigation.

3. PARTIES—*Service of Process—Averments in Bill—Case at Bar.*—A suit to set aside a deed from husband to wife as fraudulent was revived on the death of the husband. Under the deed alleged to be fraudulent the wife had only a life estate with remainder to the grantor's children. The children were not made parties to the suit and the deed was not filed as an exhibit with the bill, but was subsequently introduced in evidence. When the case was revived upon the death of the grantor in the deed, the recital in the decree of revival plainly showed that it was revived against his children as heirs of the grantor, and not as remaindermen in the deed from the grantor to his wife. Indeed, it could not have been otherwise, as there was not an allegation in the bill in any way affecting the children. There was nothing in the pleadings to show that they had any manner of interest in the litigation, and if they had been made parties during the lifetime of their father, the case would have been dismissed as to them for lack of interest in the litigation upon the face of the pleadings. They could not, with propriety, have been made parties defendant to the suit, otherwise than as heirs of the grantor, without so amending the bill as to set out their interest under the debt.

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Held: That the children never having been made parties as remaindermen under the deed, they could not be bound by a decree in the suit.

4. SERVICE OF PROCESS—*Publication—Default.*—When a suit in equity is matured by order of publication against a non-resident, who does not appear, the bill is not taken for confessed, but the case is simply set for hearing on the process thus executed. It is the duty, therefore, of the complainant, to prove his case. If, as in the instant case, this proof is offered in the form of depositions, the defendant is entitled to notice of the time and place of taking them, else they cannot be read against him. This notice may be constructive, as well as the notice to commence the suit. But there must be notice of some kind and this notice must be given before the depositions are taken. Notice afterwards comes too late.

5. SERVICE OF PROCESS—*Publication—Of What Proceedings Notice.*—It is entirely competent for the legislature to dispense with more than one publication, and to provide that one publication shall be notice of all proceedings in the cause subsequent to the completion of the order, and the legislature of this State has so provided by section 3232 of the Code of 1904. Under this section, "the case may be tried or heard" as to the non-resident, but the section does not authorize the taking of the bill for confessed at any time nor the doing of any act before the completion of the order. Depositions taken before that time without other notice than that furnished by the order are not taken pursuant to the statute, and cannot be given in evidence against a non-resident who has not appeared in the case, nor assented thereto.

6. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Parties to Action.*—In a suit to set aside a deed as fraudulent, the remaindermen under the deed are necessary parties.

7. APPEAL AND ERROR—*Parties—Objection for First Time on Appeal.*—Where there is such a defect of parties to a suit that injustice may be done if the absent parties be not before the court, the Supreme Court of Appeals will remand the case in order that proper parties may be brought before the court, although no objection on that ground was made either in the trial court or on appeal.

Appeal from a decree of the Circuit Court of Prince William county. Decree for complainant. Defendants appeal.

Reversed and remanded.

The opinion states the case.

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C. E. Nicol, R. A. McIntyre, Howard W. Smith and *Eppa Hunton, Jr.*, for the appellants.

Moore, Keith, McCandlish & Hall, Wm. H. Gaines, Jno. S. Barbour, Greenville Gaines and *Wilson M. Farr*, for the appellees.

BURKS, J., delivered the opinion of the court.

The parties to this litigation have at great trouble and expense endeavored to prepare the suit for a hearing on the merits, and have presented for our consideration a printed record of upwards of five hundred pages. The suit was brought in 1907. A large number of depositions have been taken in the case, and it is with regret that we find that, on account of defect of parties, the matters in controversy cannot now be determined on their merits.

The bill was filed in the Circuit Court of Fauquier county by Eustace Jeffries against James P. Jeffries, his nephew and attorney, charging the latter with many acts and transactions by which it is alleged he had fradulently possessed himself of nearly the entire estate of the complainant. The bill also charges that James P. Jeffries had fraudulently and without consideration conveyed to Mary H. Jeffries, his wife, all of the property of the complainant so acquired as aforesaid; and that his wife had notice of the fraud affecting her title; and the bill prays that the various fradulent transactions charged, including the deed to his wife, may be set aside as clouds on complainant's title, that the title to the land be declared to be in the complainant, and that sundry deeds mentioned in the bill be set aside as clouds on his title. The only parties made defendants were James P. Jeffries and his wife, Mary H. Jeffries. Soon after the bill was filed James P. Jeffries was adjudged to be of unsound mind and C. M. White, who was counsel for the said Mary

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H. Jeffries, was appointed committee and guardian *ad litem* for the said James P. Jeffries, and subsequently filed his answer in that capacity. The suit was transferred from the Circuit Court of Fauquier county to the Circuit Court of Prince William county, April 5, 1909, where it was finally heard and determined.

The bill is very lengthy, and sets forth in great detail all of the alleged fraudulent acts and transactions sought to be annulled. The deed above mentioned from Jeffries to his wife was not filed as an exhibit with the bill, but was subsequently introduced in evidence. After setting out the details of the alleged fraud, the bill makes the following charge with reference to the deed from Jeffries to his wife: "Your orator shows that said James P. Jeffries, still intending and contriving, after your orator became aware of his perfidious and unfaithful conduct, to prevent your orator from compelling him to make restitution, and intending to keep to himself the fruits of his fraudulent efforts, and intending still further to hinder, delay and defraud your orator, by deed dated the ..... day of ....., 19...., and recorded in the clerk's office of Fauquier county, Virginia, in deed book ....., page ....., fraudulently and deceitfully, and without valuable consideration, conveyed to Mary H. Jeffries, his wife, all of his property, including that purchased by him, as above, who, with notice of the fraud affecting his title thereto, has accepted and retained the title to the same, and refused to make restitution to your orator." The prayer of the bill, after asking that various transactions be set aside, also asks that "his subsequent conveyance thereof to his wife be set aside and annulled as clouds on your orator's title." The bill contains no statement of any fact affecting the interest of the children of James P. Jeffries, makes no charge of fraud on their part, and, in fact, does not mention them. But in the course of the introduction of evidence in the

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case, the deed from James P. Jeffries to his wife was introduced in evidence. This deed shows that, as to a portion of the most valuable tract of land in controversy, known as "Rhode Island," containing two hundred acres, the conveyance was to the wife for life, with remainder in fee to his two children, Nannie S. P. Jeffries and James P. Jeffries, Jr., who were then infants. They were thus given vested remainders in fee in said two hundred acres of land. During the progress of the suit both the complainant and the defendant, James P. Jeffries, died, and the suit was revived by decree made June 5, 1908. As to the defendant, James P. Jeffries, the revival was made on motion of his daughter, who had in the meantime become of age and married, against herself and James P. Jeffries, Jr., who was still an infant. In the order of revival, C. M. White, who was counsel for Mrs. Jeffries, was appointed guardian *ad litem* for James P. Jeffries, Jr. No answer was filed by him as guardian *ad litem*, but the decree ordering the revival is endorsed "seen" and signed by White, though nothing appears to indicate that he signed it as guardian *ad litem*. This was not sufficient evidence of acceptance of the office of guardian *ad litem*, and certainly did not amount to an appearance of the infant by his guardian. *Alexander* v. *Davis*, 42 W. Va. 465, 26 S. E. 291. By decree entered November 22, 1911, the death of White is suggested and R. A. McIntyre, who had succeeded him as counsel for Mrs. Jeffries, was appointed guardian *ad litem* for James P. Jeffries, Jr. No answer was filed by McIntyre as guardian *ad litem*, and there is no evidence that he ever accepted the appointment. It was stated at the bar of this court during the oral argument that he did not know of his appointment. No process was ever served on the infant, and he never appeared by guardian *ad litem* or otherwise, and hence was never brought before the court.

In April, 1915, counsel for Mrs. Jeffries stated to counsel

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for the complainants that they did not represent the children of James P. Jeffries. All of the depositions in the case had then been taken, and counsel for the complainants then sought to revive the case against the two children, both of whom in the meantime had become of age, by *scire facias*. The *scire facias* was twice sued out without getting service, and thereupon, on July 20, 1915, an order of publication was issued against the children, which was duly published and posted as required by law.

When the case was revived as to James P. Jeffries, in June, 1908, the recital in the decree of revival plainly shows that it was revived against his children as heirs of James P. Jeffries, and not as remaindermen in the deed from Jeffries to his wife. Indeed, it could not have been otherwise, as there was not an allegation in the bill in any way affecting the children. There was nothing in the pleadings to show that they had any manner of interest in the litigation, and if they had been made parties during the lifetime of their father, the case would have been dismissed as to them for lack of interest in the litigation upon the face of the pleadings. Under the allegations of the bill, there was no more reason why they should be made parties than any other persons in Fauquier county. Why they were not made parties in the first instance is a mere matter of conjecture, but it would seem, from reading the charges of the bill, and its prayer, that the wife only was made a party because counsel in the preparation of the bill overlooked the fact that the two children had a direct and substantial interest in two hundred acres of the most valuable land in controversy. This interest is in no way assailed by the bill, and they are unaffected by any decree that has been, or could have been, made in the case, in its then condition, affecting their interest under the deed from James P. Jeffries to his wife. They could not, with propriety, have been made parties defendant to that suit, otherwise than as heirs

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of James P. Jeffries, without so amending the bill as to set out their interest under said deed. Neither the *scire facias* nor the order of publication attempted to accomplish this result, nor could they have been effectual to do so. The order of publication was simply a process to bring them in to answer the charges made in the bill. It could not call upon them to answer statements made in the evidence. If, in answer to this process, they had inspected the bill, they would have found nothing in it that could in any way have affected their interest acquired under the deed from James P. Jeffries to his wife, and no decree affecting such interest would have been binding upon them. A person cannot be made a party by simply naming him as a defendant and serving him with process. The bill must contain averments showing some cause for relief against him, else he is no party to the litigation. *R. D. Johnson Milling Co.* v. *Read*, 76 W. Va. 557, 85 S. E. 726; *Moseley* v. *Cocke*, 7 Leigh (34 Va.) 224; *Gurnee* v. *Bausemer*, 80 Va. 867; and cases cited.

But even if the bill had been so amended as to contain the needful allegations, the failure to appear in response to the notice by publication would not have been a confession of the allegations of the bill, nor a waiver of the notice required to take the depositions in the case. When a suit in equity is matured by order of publication against a non-resident, who does not appear, the bill is not taken for confessed, but the case is simply set for hearing on the process thus executed. It is the duty, therefore, of the complainant, to prove his case. If, as in the instant case, this proof is offered in the form of depositions, the defendant is entitled to notice of the time and place of taking them, else they cannot be read against him. This notice may be constructive, as well as the notice to commence the suit. But there must be notice of some kind and this notice must be given before the depositions are taken. Notice afterwards comes too late. Compare *Pennoyer* v. *Neff*, 95 U. S. 714,

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24 L. Ed. 565. It is entirely competent for the legislature to dispense with more than one publication, and to provide that one publication shall be notice of all proceedings in the cause subsequent to the completion of the order, and the legislature of this State has so provided by section 3232 of the Code. This section provides, among other things, that "the case may be tried or heard as to tem and no other publication or notice shall be thereafter required in any proceeding in court, or before a commissioner, or for the purpose of taking depositions, unless specially ordered by the court as to such defendant or unknown parties, but if they should be represented by counsel residing in this State of record, or known to the plaintiff, reasonable notice of any proceeding before a commissioner, or of the taking of depositions should be given to such counsel or any of them if there be more than one." Under this section, "the case may be tried or heard" as to the non-resident, but the section does not authorize the taking of the bill for confessed at any time, nor the doing of any act before the completion of the order. Depositions taken before that time without other notice than that furnished by the order are not taken pursuant to the statute, and cannot be given in evidence against a non-resident who has not appeared in the case, nor assented thereto. All of the testimony in this case was so taken, and certainly as to James P. Jeffries, Jr., if not as to his sister, cannot be read, as he has never appeared by guardian *ad litem*, nor in person, and has not otherwise assented thereto. He has confessed nothing. He has waived none of his rights, and the order of publication awarded after all the depositions were taken cannot deprive him of the notice to which he was entitled. He was, and is, a necessary party to the suit, and no decree affecting his interest under the deed from James P. Jeffries to his wife can be made in the suit in its present condition without seriously jeopardizing his rights. So far, then, as affects the

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remainder interest of the children of James P. Jeffries in the two hundred acres aforesaid, the decree of the circuit court is in no wise binding upon them.

It is insisted by counsel for the appellee that the objection of the want of proper parties cannot be made for the first time *in this court,* and the following cases are cited to support that position: *Blue* v. *Poling,* 68 W. Va. 547, 70 S. E. 279; *N. & P. Co.* v. *Norfolk,* 115 Va. 169, 78 S. E. 545, Ann. Cas. 1914 D, 1067; *Redd* v. *Supervisors,* 31 Gratt. (72 Va.) 685. In the instant case, as to the two infant defendants, there was neither process against, nor appearance for, them while infants. There was no charge in the bill as to the deed to their mother which they were called upon to answer, and the order of publication, awarded against them after they became of age, was not awarded until all the evidence against them had been taken. This evidence, as we have seen, could not be read against them, and there was no evidence in the case upon which to base a decree affecting their interests under the deed from James P. Jeffries to his wife. It was necessary that the case should be in a proper condition to pass upon their rights under this deed before any decree could be made affecting the interest of Mrs. Jeffries under the same deed. The interests of the children of James P. Jeffries arising under the deed to his wife are so intimately connected with the interest of his wife arising under that deed that the latter cannot be passed upon without also passing upon the interests of said children who have had no opportunity to be heard on the questions involved. Under these conditions, we have held that, "Where there is such a defect of parties to a suit that injustice may be done if the absent parties be not before the court, this court will remand the case in order that proper parties may be brought before the court, although no objection on that ground was made either in the trial court or here." *Wasserman* v. *Metzger,* 102 Va.

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837, 47 S. E. 820. In the instant case, the children of Mrs. Jeffries were never parties to the suit as remaindermen under the deed to her. *Moseley* v. *Cocke, supra; R. D. Johnson Milling Co. v. Read, supra.* The order of publication did not supply the deficiency in the allegations of bill, and even if it could have done so, it came too late to authorize the reading of the depositions taken in the cause.

For these reasons, the decree of the circuit court must be reversed, and the cause remanded, with direction to the circuit court to permit the complainants, if they shall be so advised, to so amend their bill as to put in issue the right of the children under said deed, or else to disclaim any purpose to question their rights thereunder.

Reversed and remanded.

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Wytheville.

KEISTER'S ADMINISTRATOR v. KEISTER'S EXECUTORS.

June 13, 1918.

1. HUSBAND AND WIFE—*Assault and Battery—Action by Wife.*—At common law a wife could not maintain an action for damages for an assault upon her by her husband during the coverture.
2. ACTIONS—*Right of Action.*—A right of action at law can in no case exist unless, (a) the plaintiff be found to have had, at the time alleged cause of action arose, a substantive civil right, the breach or invasion of which right (constituting in the case of a tort a civil wrong) gave rise to a cause of action; and (b) the plaintiff be found to have had, at the time the action is instituted, a civil remedy by action at law.
3. HUSBAND AND WIFE—*Assault and Battery—Action for Death—Section 2286-a, Code of 1904.*—Section 2286-a of the Code of 1904 provides as follows: "A married woman may contract and be contracted with, sue * * * in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by * * * her, shall have accrued before or after the passage of this act."

   Held: That this statute has not conferred upon a married woman a right of action against her husband for damages for an assault upon her committed by the husband during the coverture. It follows, therefore, that the personal representative of a wife, who was killed by her husband when the husband and wife were living together in that relationship, has no right of action against the husband or his personal representative for the death of the wife.
4. HUSBAND AND WIFE—*Assault and Battery—Action for Death—Section 2286-a, Code of 1904.*—The portion of the act quoted in the preceding headnote had reference only to the remedies thereby given to a married woman. It merely provides that at all times during the coverture a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary to give rise to such cause of action, and does not confer the substantive right necessary to support the right

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of a married woman to sue her husband for an assault upon her committed by him during the coverture.

5. WORDS AND PHRASES—*"Unmarried"—Section 2286-a, Code of 1904.*—The word "unmarried" originally and ordinarily means, it is true, *never having been married,* but the term is a word of flexible meaning and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question,* and as the term is used in section 2286-a, Code of 1904, it has the meaning of "not having a husband" at the time of the suit or action.

6. STATUTES—*Construction—Derogation of Common Law.*—The legislature is presumed to have known and to have had the common law in mind in the enactment of a statute; and the statute will be construed to read as if the common law remained unchanged (that is to say, the statute will be read along with the provisions of the common law, and the latter will be read into the statute), unless the purpose of the statute to change the common law appears from the express language of it or by necessary implication from such language.

7. STATUTES—*Construction—Prior Statutes.*—The statute law, existing at the passage of an act, as well as the common law, should be borne in mind in construing it, and the latter statute should be construed in the light of the prior statute law on the subject.

8. STATUTES—*Construction—General Act—Codification—Repeal.*—To a general act on a subject, in which the entire law on that subject is recast and condensed and certain provisions of the former law are repealed, the same rule of construction is applicable as is applicable to a general codification of statute laws. No intention to change the meaning or effect of prior statutes is to be inferred from a mere change of phraseology in the statute as codified. The presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new.

Error to a judgment of the Circuit Court of city of Norfolk, in an action of trespass on the case. Judgment for defendants. Plaintiff assigns error.

Affirmed.

STATEMENT OF THE CASE AND FACTS.

This case is before us upon review of the action of the court below in sustaining a demurrer to the declaration

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of the plaintiff in error against the defendants in error and dismissing the declaration in an action for damages for the death of the plaintiff's intestate alleged to have been caused by the wrongful act of the testator of the defendant in error.

THE FACTS.

The material facts appearing from the allegations of the declaration are, that a wife (the plaintiff in error's intestate) was killed by her husband (the defendant in error's testator); that the husband and wife were lawfully married and were living together in that relationship when the wife was so killed; that the husband survived his wife and then died leaving a will by the appointment of which the defendants in error duly qualified as his executors.

E. R. Baird, Jr., for the plaintiff in error.

E. R. F. Wells, for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The following positions with respect to the law are well settled and are not questioned by counsel in the case:

Notwithstanding the existence of the statutes, sections 2902, 2903 and 2906 of the Code of Virginia, the plaintiff in error in the instant case had no right to maintain the action and the demurrer was, therefore, properly sustained by the trial court, unless the wife, had she survived, would have had a right of action against the husband, had he survived, for damages for an assault upon her by him during the coverture. At common law no such right of action existed on the part of the wife. If such a right of action

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existed at the time the action in the instant case was instituted, it was conferred by section 2286-a of Pollard's Code of Virginia, 1904 (Acts 1899-199, p. 1240). That part of such statute relied on as conferring the right of action in question, is as follows:

"* * * A married woman may contract and be contracted with, sue * * * in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by * * * her, shall have accrued before or after the passage of this act. * * *"

The sole controverted question in the case, upon which its decision turns, is—

1. Has the statute last quoted changed the common law on the subject and conferred upon a married woman a right of action against a husband for damages for an assault upon her committed by the husband during the coverture?

This is a question of first impression in this State and must, therefore, be resolved by a consideration of it upon principle and the construction of the statute last quoted, with such aid as we can obtain from the decisions of other jurisdictions construing statutes on the same subject.

In approaching this question we have to bear in mind the elementary principle that a right of action at law can in no case exist unless, (a) the plaintiff be found to have had, at the time the alleged cause of action arose, a substantive civil right, the breach or invasion of which right (constituting in the case of a tort a civil wrong) gave rise to a cause of action; and (b) the plaintiff be found to have had, at the time the action is instituted a civil remedy by action at law.

In regard to the very ancient maxim that wherever there is a right there is a remedy, it is said in 1 Cooley on Torts (3d ed.), p. 22: "*No Wrong Without a Remedy.* Judicial development of the law is perceived in two forms: In the recognition of rights and in giving a remedy for the inva-

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sion or deprivation of rights. * * A right cannot be recognized until the principle is found which supports it. But when a right is found, a remedy must follow of course."

The primary inquiry confronting us in the instant case, therefore, is whether the married woman's statute in Virginia, the portion of which relied on by the plaintiff in error is quoted above, confers upon married women during coverture the substantive civil right essential to support a cause of action in a suit at law for damages instituted during the coverture by a wife against her husband, for an assault upon her committed by the husband during the coverture?

The substantive civil right in question is a legal existence—a legal personality—of a married woman, separate and apart from the legal personality of her husband, during coverture. Such a right a married woman had not and has not at common law.

The inquiry before us, therefore, is not whether the statute relied on, as aforesaid, has given married women the same remedies they would have if unmarried (whether as if they had never married, or as if no longer married) to enforce or to obtain compensation for the invasion of substantive rights which may accrue to married women (whether at common law or by statute), but whether the statute aforesaid has conferred on married women the particular substantive right aforesaid. This is apparent when we consider that the statute may do the former completely, and yet, if a married woman be not given the civil right aforesaid, out of the invasion of which only can arise the cause of action in question, the remedy given her by the statute can avail her nothing in an action such as that in question.

Hence, it must be constantly borne in mind in the consideration of the subject before us that the primary inquiry is, has the statute last quoted conferred upon married

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women the substantive right above mentioned—has it changed the rule of the common law on this subject?

Now with respect to the construction of statutes in derogation of the common law there are certain well settled rules which have been so long and so well established that we need but to refer to them. Among those rules is the following: The legislature is presumed to have known and to have had the common law in mind in the enactment of the statute; and the statute will be construed to read as if the common law remained unchanged (that is to say, the statute will be read along with the provisions of the common law, and the latter will be read into the statute), unless the purpose of the statute to change the common law appears from the express language of it or by necessary implication from such language. The existence of the rule last mentioned is not controverted in the instant case. We do not, therefore, occupy space in discussing it, or citing authority to sustain the statement of such rule.

Coming now to construe the statute of Virginia aforesaid in the light of the common law on the subject, and by aid of the rule of statutory construction mentioned, we are met by the following considerations:

Such statute does not *expressly* confer the substantive right aforesaid. Does it do so by necessary implication? If so, it must, of course, be done by words of no uncertain meaning; by language which must not be entirely consistent with the common law on the subject remaining unaltered.

Whether the statute above quoted confers on married women the substantive right aforesaid manifestly depends, in the last analysis, upon, ascertaining to what point of time, in the life of the married woman asserting the right of action in question, the statute means to refer in its reference to her status as "unmarried;" and also upon ascertaining the meaning with which the statute uses the word "unmarried." Does it mean to refer to the time of the

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arising of the alleged cause of action (to the time of the assault of the husband upon the wife in a case such as the instant case), and to say that the status of a married woman shall be regarded, as of that time, as if it were the same as if she had *never been married?*: or does the statute refer to the time the suit or action is instituted, and mean to say that, as of the latter time, she shall be regarded as not having a husband? Are we to construe the clause of the statute, "as if she were unmarried," to mean, "as if she did not have a husband," or "as if she had never been married"? It is only by the latter construction that any foundation can be found on which to rest the position that the statute by implication changes the common law and confers upon married women the substantive right aforesaid.

Now the word "unmarried" originally and ordinarily means, it is true, *never having been married*—"But the term is a word of flexible meaning and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question.*" 8 Words & Phrases (1st ed.), p. 7196. (Italics supplied.) The subject of that part of the statute which is under consideration is the right of a married woman to sue (and also their liability to be sued, on the side of the statute not quoted above and with which we are not concerned in the instant case). If the legislature had intended to confer upon married women the substantive civil right of a legal existence and legal personality separate and apart from that of the husband, during coverture, nothing was easier than for it to have said so in language of no uncertain meaning. If it intended not to confer such a substantive right, but merely to enlarge the remedies of married women with respect to other substantive rights of theirs existing at common law and conferred by the first portion of this very statute, the language of the statute was appropriate to accomplish the latter purpose and its object is fully accomplished when the

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statute is given that meaning. It is not necessary, therefore, that any further meaning be given to it. This being so, we cannot, under the rule of construction above referred to, give any further meaning to it. Hence, it seems clear to us that the statute in its use of the word "unmarried" has reference to the time the suit or action in quesion is instituted, and uses the word "unmarried" with the meaning of "not having a husband" at the time of the suit or action. Such being the meaning with which the word "unmarried" is used in the statute, clearly the effect of the statute, as above indicated, is merely to provide that all disabilities of married women *to sue* (and be sued) are thereby removed *as of the time a suit or action is instituted* by (or against) a married woman, upon any cause of action then existing by or against her. That is to say, the statute under consideration merely provides that at all times during the coverture a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary, as aforesaid, to give rise to such cause of action. The statute, therefore, is entirely consistent with the common law, which does not confer the substantive right aforesaid on married women, and hence does not change the common law in that regard by implication. That is to say, the portion of the statute under consideration has reference only to the remedies thereby given to married women and does not confer the substantive right necessary to support the right of a married woman to sue her husband for an assault upon her committed by him during the coverture.

Such is the conclusion to which we are led by a consideration of the statute on principle and under what are universally considered and admitted to be proper rules of construction of such a statute. We are confirmed in that conclusion by our examination of the authorities on the subject.

In the case of *Fitzpatrick* v. *Owens*, 124 Ark. 167, 186

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S. W. 832, 187 S. W. 460, L. R. A. 1917 B, 774, relied on by the plaintiff in error, a portion of the married woman's act of Arkansas was substantially the same as that portion of the Virginia statute above quoted. Such portion of the Arkansas statute is as follows: "* * * * every married woman and every woman who may in future become married, shall have all the rights * * to sue * * as thought she were a *femme sole.*" Laws 1915, p. 684. As to that portion of the Arkansas statute, the Arkansas court, in a very able opinion by McCulloch, C. J., in the case last cited, said: "The words 'to sue and be sued' when considered by themselves, merely enlarge the remedies of married women and do not enlarge her rights."

It is true that the Arkansas court, in the case last cited, held that the married woman's act of that State conferred the substantive right aforesaid upon married women and that an action by a married woman against her husband for damages for an assault committed upon her by the husband during coverture may be maintained in that State under such statute. But the language of that statute is materially different from the Virginia statute relied on in the instant case. The Arkansas statute, in addition to the language above quoted therefrom having reference to the remedies of married women, contains also the following language conferring substantive rights; "* * in law and equity shall enjoy all rights and be subject to all the laws of the State as though she were a *femme sole.*" This language appears in the Arkansas statute in the following connection: "* * every married woman and every woman who in the future may become married, shall have the rights * * to sue * * and *in law and equity shall enjoy all rights, and be subject to all the laws of the State, as though she were a femme sole.*" (Italics supplied.) It was because of the words which we have italicized that the Arkansas court held that the substantive

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right aforesaid was conferred by the statute of that State on married women. This clearly appears to have been the controlling factor in that decision, as will be seen from the following quotation from the opinion of the court in that case: "An analysis of the language of the statute shows that the legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by an unmarried woman. The words 'to sue and be sued,' when considered by themselves, merely enlarge the remedies of a married woman and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serve to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of married women 'to contract and be contracted with,' and the words which follow declare in the very broadest terms her right 'in law and equity' to 'enjoy all rights and be subject to all the laws of the State as though she were a *femme sole.*' If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and at equity all the rights which she would enjoy if she still remained *a single woman,* and that with respect to those rights she may sue and be sued." (Italics supplied.)

In the Virginia statute on the subject, we have no provision corresponding with the Arkansas statute conferring on married women all substantive rights to be enjoyed by her as "if she still *remained a single woman.*" (Italics supplied.) Hence, the decision last cited is no authority for the position that the same construction should be given the Virginia statute as that given the Arkansas statute. On the contrary, the principle on which the Arkansas de-

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cision was correctly based is opposed to such a construction of the Virginia statute.

With us the merger of the legal existence of a married woman, during coverture, in the personality of the husband has, it is true, been removed by statute so as to exist no longer with respect to many subjects, but not as to all subjects. As we have seen above, nothing can be found in that portion of our statute relied on as aforesaid, which has the effect of declaring that a married woman shall during the coverture have a separate legal existence and personality from that of her husband as if she had never been married. Many disabilities of married women have been removed by the statute in Virginia, both with respect to their rights and remedies, but not *all*, with respect to her personal rights, certainly. To give only one illustration: It was held by this court in *Norfolk, etc., Co.* v. *Williar*, 104 Va. 679, 52 S. E. 380, per the syllabus of that case: "Notwithstanding the comprehensive provisions of the present married woman's act in this State (Acts 1899-1900, p. 1240), the husband is still entitled to the services of his wife and in an action by her to recover damages for injury inflicted upon her, while the only testimony as to diminution of her ability to perform her ordinary duties related to her impaired capacity to attend to her household duties, it is error to instruct the jury that in ascertaining the damages they may take into consideration the diminution, if any, of her physical ability to perform the ordinary duties of life, as the language of the instruction covers damages for which the husband alone can recover." Here is a substantive right not conferred on married women by the statute, which would have been conferred upon them if the construction of it relied on by the plaintiff in error were correct.

We are indebted to the learning and diligence of able counsel on both sides of this case for their exhaustive citation and discussion of the numerous authorities construing

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statutes of other jurisdictions on the subject of the right of action of married women against their husbands for torts committed upon them during coverture by their husbands. All of such authorities have been carefully examined and considered. We shall here cite those of them which in any way, even remotely, seem to us to throw light upon the question before us. *Fitzpatrick* v. *Owens, supra; Fiedler* v. *Fiedler,* 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189; *Brown* v. *Brown,* 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185, Ann. Cas. 1915 D, 70; *Gilman* v. *Gilman,* 78 N. H. 4, 95 Atl. 657, L. R. A. 1916 B, 908; *Thompson* v. *Thompson,* 218 U. S. 611, 31 Sup. Ct. 111, 54 L. Ed. 1180, 30 L. R. A. (N. S.) 1153, 21 Ann. Cas. 921; *Longendyke* v. *Longendyke,* 44 Barb. (N. Y.) 366; *Freethy* v. *Freethy,* 42 Barb. (N. Y.) 641; 2 Bishop on Law of Married Women, sec. 377, approving the two last named cases; *Schultz* v. *Schultz,* 27 Hun. (N. Y.) 26, contra to the two New York cases last above cited, but reversed in *Schultz* v. *Schultz,* 89 N. Y. 644, holding in accord with the before named New York cases; *Lillienkamp* v. *Rippetos,* 133 Tenn. 57, 179 S. W. 628, L. R. A. 1916 B, 881, Ann. Cas. 1917 C, 901; *Peters* v. *Peters,* 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699; *Strom* v. *Strom,* 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387; *Schultz* v. *Christopher,* 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780; *Peters* v. *Peters,* 42 Iowa, 182; *Bandfield* v. *Bandfield,* 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757, 72 Am. St. Rep. 550; *Rogers* v. *Rogers,* 265 Mo. 200, 177 S. W. 382; *Sykes* v. *Speer* (Tex. Civ. App.), 112 S. W. 422; 1 Cooley on Torts (3d ed.), p. 474.

In view of the importance of the subject, we will make some special reference to those of the above cited decisions which involve the construction of statutes which are most nearly alike the Virginia statute we have before us for construction.

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The case of *Thompson* v. *Thompson, supra,* was an action by a wife against her husband for damages for an assault upon her by him, committed during the coverture, and involved the construction of the District of Columbia statute. That statute so far as material, was as follows: "Married women shall have power to * * sue separately * * for torts committed against them, as fully and freely as if they were unmarried." Code D. C., § 1155. In all essential particulars this statute is the same as the Virginia statute we have under consideration. The majority opinion in the *Thompson Case* held: "The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband." In this opinion it is also said: "We cannot but regard this case as another of many attempts which have failed to obtain by construction radical and far reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration."

Mr. Justice Harlan delivered a dissenting opinion in the *Thompson Case* in which Mr. Justice Hughes and Mr. Justice Holmes concurred. They were of opinion, in substance, that the statute by necessary implication changed the common law on the subject and conferred upon married women the right to maintain such an action. The dissenting opinion takes the position that such a result necessarily followed from the language of the statute, unless there was read into and added to the statute the following language not found therein: "provided, however, that the wife shall not be entitled in any case to sue her husband * * for a tort committed against her person." With the utmost respect for the learned judge who delivered such dissenting opinion and the two learned judges who concurred therein, we are of opinion that upon principle, apart from its authority, the

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opinion of the majority of the Supreme Court in that case is sustained by the better reasoning. In truth it was but the common law which the majority opinion read along with and hence read into the statute in the particular just stated. If the statute conferred rights of remedy only in respect to torts, and not substantive rights, upon married women, this rule of the common law and the provision of the statute could both stand and be read together. Hence there was no change of the common law by the statute by implication. And so the majority opinion held.

In New York the statute concerning married women which was construed in the New York cases above cited, was as follows: "Any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character the same as if she were unmarried." Laws 1860, c. 90, § 7. Here again we have a statute very like the Virginia statute we have under consideration. In all essential respects the statutes are the same. As the result of the decision of the court of last resort of New York in the case of *Schultz* v. *Schultz*, 89 N. Y. 644, reversing the holding of the Supreme Court of New York in that case in conflict with the cases of *Freethy* v. *Freethy* and *Longendyke* v. *Longendyke*, *supra*, the holding of the two last named cases must be taken to be the construction of the New York statute by its court of last resort. Such construction is that the New York statute above quoted does not confer upon a married woman the right to sue her husband for assault or slander committed upon or spoken against her during the coverture. The court, in the *Freethy Case*, in its opinion said: "When the legislature intends to make such a striking innovation of the rule of the common law * * it should use such language as will make it clearly manifest and not leave it to the construction of the courts."

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In *Fiedler* v. *Fiedler, supra,* in which it was held that the substantive right aforesaid was conferred upon married women by the statute of Oklahoma, the statute law construed provided, amongst other things, that "Women *shall retain the same legal existence and legal personality after marriage as before marriage* * * " (Italics supplied.) "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." "Detriment is a loss or harm suffered in person or property." "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this State * * " The express language of the statute, "Women shall retain the same legal existence and legal personality after marriage as before marriage," conferred upon married women the substantive civil right of a legal existence and legal personality apart from the personality of the husband during coverture. Hence an assault by the husband upon a wife, although during coverture, would be in violation of such civil right and would give rise to a cause of action therefor in the wife. Therefore, the next following provision of the Oklahoma statute above quoted, conferred upon the wife a remedy in the premises by action for damages. Upon principle, therefore, the decision last cited is wholly in accord with the positions taken above, and it was unnecessary for the court in that case to rely at all upon the statute of Oklahoma last above quoted. Hence, there is nothing in the construction by such case of the Oklahoma statute to warrant the same construction of the Virginia statute. Indeed, a consideration of the former statute discloses the precise enactment which is lacking in the Virginia statute to confer the substantive civil right upon married women which is necessary, as aforesaid, to support the action in the instant case.

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It is true that in Connecticut and New Hampshire it is held that married women's acts which seem to us to have gone no farther than the Virginia statute law on the subject, have completely emancipated married women from all disabilities of coverture, both as to rights and remedies, and, hence, have conferred on married women the substantive civil right aforesaid. *Brown* v. *Brown* and *Gilman* v. *Gilman*, *supra*. These are the only decisions to which we have been cited or which we have been able to find which are inconsistent with the conclusion we have reached above. For the reasons above stated, however, we cannot consider that these decisions are correct on principle and hence we cannot follow them.

The case of *Peters* v. *Peters*, *supra*, should, perhaps, be referred to, on the question as to whether other portions of section 2286-a of the Virginia statute not quoted above (and not relied on, indeed, by the plaintiff in error), confer the substantive right aforesaid upon married women. The first part of the Virginia statute referred to confers upon married women the substantive right to acquire and hold property, etc., "as if she were unmarried." Here, plainly, the reference in the statute to the status of "unmarried" is to be referred to the point of time when the property is acquired or is held, and hence the statute plainly confers upon women married at the time they acquire and hold property the substantive civil right to do so. And the subsequent provision of the statute conferring rights of remedy upon married woman operates to give them right of action for the violation of any of their rights of property, conferred by the preceding portion of the statute as well as by the common law. Now, as flowing from these considerations, the question arose in the *Peters Case* whether the right of a married woman to sue her husband for a tort committed upon her by the husband during coverture was her *property*. Of course, if she had such a right of suit it was in

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truth *property*. But, as was held in the *Peters Case*, whether such a right existed was the very question in issue; and it was but begging the question to say that if she possessed such a right it was property and *ergo* the statute conferred such right when it conferred on married women the right to acquire property. The question still remained, whether the statute conferred on married women the substantive right aforesaid; and it was decided that the effect of the provisions of a statute substantially the same as that of the first part of the Virginia statute aforesaid did not confer such a substantive right.

But one aspect of the instant case remains to be dealt with by us. It is urged upon our consideration, in behalf of the plaintiff in error, that the statute law, as well as the common law, existing aforetime, should be borne in mind by us in construing that portion of section 2286-a relied on as aforesaid, and that the latter statute should be construed in the light of prior statute law on the subject. This should undoubtedly be done and will be done by us.

Attention is called by counsel to the provision contained in section 2284 of the Code of Virginia of 1887 which is as follows: "Nothing, however, in this or any other section of this chapter shall be construed as giving to a married woman a right to damages or a right of action therefor against her husband for any injury to her person or reputation committed by him before marriage or during the coverture." Attention is also called by counsel to what was said by this court in *Hirth* v. *Hirth*, 98 Va., at page 121, 34 S. E. 964, to-wit: "If the object of the revisors had been to emancipate all married women from the disabilities of coverture, there would have been no need of chapter 103 of the Code, but it might have been accomplished in a few brief sentences in one section;" and to the fact that this opinion was rendered on the 15th of February, 1900, and that the legislature, in March next following, in Acts 1899-

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1900, page 1240, by enacting section 2286-a aforesaid, amended sections 2291, 2293, 2294 and 2296, and repealed the remaining sections of chapter 103 of the Code of 1887, including section 2284 aforesaid. And it is urged, that in view of the broad language of section 2286-a aforesaid with respect to the right to sue thereby given to married women (quoted in the first part of this opinion), the repeal of section 2284 aforesaid, containing the express provision thereof aforesaid, "is the strongest evidence of the existence of an intention upon the part of the legislature not to forbid the assertion of a right such as the plaintiff is in this case insisting upon," and that it is, indeed, strong evidence that the legislature intended to confer and did confer such right on married women by section 2286-a aforesaid. There are three considerations which seem to us to wholly negative the inference thus sought to be drawn. First, the statute (Acts 1899-1900, page 1240), was a general act on the subject, in which the entire married woman's law was recast and condensed and nine sections of the Code of 1887, including the entire section 2284, were repealed. It is not a case of the amending of a statute and leaving out a certain portion or portions of the former statute and retaining other portions of it, which necessarily have a different meaning with the former portion or portions left out. In principle the same rule of construction is applicable to such an act as is applicable to a general codification of statute laws. No intention to change the meaning or effect of prior statutes is to be inferred from a mere change of phraseology in the statute as codified. The presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. *Harrison & Byrd* v. *Wissler*, 98 Va. 597, 36 S. E. 982. Secondly, section 2284 of the Code of 1887 expressly conferred substantive rights upon married women and when it expressly stated that the separate estate of a married woman "* * *

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shall include rights in action, damages for a wrong * * * to which she becomes entitled during coverture," it was necessary for the legislature to include in that section such an express provision as that above quoted, negativing the intention to include the right of a married woman "to damages or a right of action therefor against her husband * * *" etc., in order to prevent such a right being given by construction of such statute, contrary to the legislative intention. In view of the wholly different phraseology of the subsequent statute (section 2286-a), however, which did not include expressly or impliedly, "rights in action, damages for a wrong * * * to which she becomes entitled during coverture" among the substantive rights conferred by the statute on married women, it was manifestly unnecessary for the negative provision aforesaid to be included in the section 2286-a statute. This consideration is amply sufficient to account for the omission of such negative provision in the latter statute. Thirdly, the language of the section 2286-a statute is such that clearly, as above shown, it will not admit of the construction contended for by the plaintiff in error. To give it such a construction would be to effect, by an unwarranted judicial construction (to use in part the language of the Supreme Court of the United States in the *Thompson Case*, above quoted) a "* * * far reaching (change) in the policy of the common law, not declared in the terms of the legislation under consideration."

The further question is raised in the instant case, whether, if there was a right of action aforesaid in the wife, it survived against the personal representative of the husband? In view of our conclusion that there was no such right of action in the wife, the further question mentioned does not arise in the case before us and hence we do not deal with it in this opinion.

For the foregoing reasons, we hold that there was no error in the action of the court below in sustaining the

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demurrer to the declaration of the plaintiff, and the judgment complained of will be affirmed.

Affirmed.

BURKS, J., concurring:

I concur in the results of Judge Sims' opinion, and will state briefly the ground of my concurrence.

At common law, husband and wife were, for the most part, regarded as one, and that one was the husband. By the mere fact of marriage, he became the owner of all her tangible personal property as fully as if he had bought and paid for it. He also became the owner of all her choses in action, provided he reduced them into possession, actual or constructive, during the coverture. He was entitled to the rents and profits of her real estate during the coverture, and, under certain conditions, this right was enlarged to an estate for his life in such rents and profits. She could not make a will, nor a contract, nor could she sue or be sued alone. It was *these* restrictions upon her rights and powers that were considered "a reproach to our civilization" and led to the enactment of statutes in every State of the Union removing, to a greater or less degree, these common law disabilities. But it must be borne in mind that marriage is something more than a mere civil contract. The mere act of marriage gives rise to a new status between the parties thereto and society, and to new rights and obligations between the parties themselves. It creates the most sacred relation known to society, and is fostered, regulated and protected by statute. Upon the preservation of its integrity, the health, morals and purity of the State is dependent. For these causes, "shall a man leave his father and mother and cleave unto his wife, and they twain shall be one flesh." The like obligation rests upon the wife. It is the duty of the husband to support his wife and to shield, defend and protect her in every way possible. It is the duty of the wife

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to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills. By the act of marriage, the parties thereto establish a unit of society, which automatically carries with it primary obligations, which cannot be destroyed without reducing that honorable estate to mere licensed cohabitation. These obligations inhere in the mere fact of marriage, and forbid the idea that this "one flesh" may so divide itself that either spouse may sue the other. Of course, it is competent for the legislature to sever this unity so far as it may seem wise to do so, and it has severed it in respect to the wife's property, but to warrant a holding that either spouse may sue the other for slander, libel or assault, the language of the statute should be so plain that there could be no room for difference of opinion on the subject. This cannot be said of our statute which simply provides that, "a married woman may contract and be contracted with, sue and be sued, in the same manner, and with the same consequences, as if she were unmarried, whether the right or liability asserted by or against her shall have accrued before or after the passage of this act." Statutes in derogation of the common law are to be strictly construed, and I am unwilling, upon such language as is contained in the foregoing statute, to obliterate the primary obligations growing out of the marriage relation, to revolutionize the whole law relating to husband and wife, and open the courts to the public discussion of domestic difference, which, when of sufficient consequence, may be settled by the chancellor in suits for divorce, or by prosecution for violation of the criminal laws of the State.

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Syllabus.

Wytheville.

KINCHELOE v. TAYLOR.

June 13, 1918.

Absent, Burks, J.

1. VENDOR AND PURCHASER—*Conditional Contract.*—A memorandum agreement for the sale of a farm, after stating the consideration and terms of payment, provided that, whereas it was understood by both the vendor and vendee that there was pending a certain suit against the vendor covering the question of possession of the farm, it was therefore understood and agreed that the vendor was to deliver immediate possession of the farm as soon as the aforesaid suit was either settled or dismissed, at which time the sale was to be closed. The concluding clause of the memorandum provided that in the event the vendor did not deliver the possession of the farm, he should reimburse the grantee any and all sums paid on account of the purchase money.

   Held: That the contract was a conditional one, only to become effective in the event the complainant in the pending suit was divested of possession and interest in the farm, and stipulating on its face the damages to be paid the grantee should the complainant not be so divested, and where a sale made by the complainant in said suit was confirmed by the court, that such confirmation rendered null and void and of no effect the conditional contract.

2. JOINT ADVENTURES—*Contracts—Jurisdiction of Equity.*—Where a vendee purchased a farm at the suggestion and through the efforts of S., and there was a prior parol agreement between the vendee and S. that the title should be taken in the vendee's name, but that the farm was to be sold, and S. in consideration of his services was to receive one-half of the proceeds of sale in excess of $8,500, S. was within his rights in invoking the aid of a court of equity to protect his interests under the contract, and the confirmation by the court of a sale effectuated by S. with one C. was within the pleadings and warranted by the evidence in the case at bar.

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3. LIS PENDENS—*Notice of Suit.*—Where the purchaser of a farm had both actual and constructive notice of a suit against the vendor, and of the rights and equities in the farm of the complainant in that suit, he took the property subject to any decree which might be rendered in the suit with respect to the property, and the broker who negotiated the sale with actual and constructive notice of the pending suit occupied no higher ground than the purchaser.
4. ILLEGAL CONTRACTS—*Stifling Bidding.*—A secret agreement entered into between the purchaser of a farm, his broker, and a third party, that if the third party would withdraw an offer of his for the farm, the purchaser would consummate his purchase and then sell to the third party for the price offered by him, was illegal as an agreement to stifle bidding, and opposed to public policy.

Appeal from a decree of the Circuit Court of Fairfax county. Decree in favor of complainant and against petitioners. Petitioners appeal.

Affirmed.

The opinion states the case.

H. W. Smith, Thos. H. Lion and *C. Keith Carlin,* for the appellants.

Moore, Keith, McCandlish & Hall, C. V. Ford and *Geo. L. Whitford,* for the appellees.

WHITTLE, P., delivered the opinion of the court.

Appellants, Arthur N. Meloy and James M. Kincheloe, complain of certain decrees of the circuit court denying to the former the benefit of an alleged completed purchase of the Aspen Hill farm, in Fairfax county, and to the latter, a real estate broker, a flat commission of $500 for effecting the sale.

Stated generally, the controlling facts are these: In June, 1916, Strayer filed his bill against Taylor, in which he as-

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serted claim to an equitable interest in the farm. His contention being that at his suggestion and through his efforts Taylor purchased the property; that there was a prior parol agreement between them that the title should be taken in Taylor's name, but that the farm was to be sold, and Strayer in consideration of his services was to receive one-half of the proceeds of sale in excess of $8,500; that on May 8, 1916, Taylor tendered to Strayer a writing as follows: "In compliance with our agreement relative to Aspen Hill farm now owned by me, I agreeing to allow you one-half of the proceeds of sale over $8,500, interest and taxes, and you in consideration of the same to move on and live on the farm and show same at all times, price and terms of sale of farm to be ratified by me. In case farm is not sold by October 1, 1916, said Strayer can at his option move off of farm, but must continue to look after same." The bill further alleged that Strayer moved on the farm in pursuance of his "verbal understanding;" that about one month afterwards and while he was endeavoring to sell the property, a controversy arose between him and Taylor as to the possession of a certain part of the dwelling, as a result of which Taylor announced his purpose to sell the farm for $8,500 and $100 additional to cover the expenses of grading a road thereon, thereby seeking to deprive Strayer of the opportunity to sell the property and to destroy his interest therein. The bill prayed that Taylor be enjoined from selling the farm, or disturbing Strayer in his occupancy and possession thereof pending the suit, and for a sale of the property under the supervision of the court and an equitable division of the proceeds, and for other further and complete relief. A *lis pendens* was filed with the bill and duly docketed and recorded, which describe the farm by name and metes and bounds, and plainly set out the scope and objects of the suit. On September 1, 1916, Taylor filed his answer denying the allegation of the bill in respect to the parol contract, and

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averred that Strayer was the agent of his vendor, Crawford, in negotiating the sale of the farm, and that no responsibility rested upon respondent to remunerate him for any services that he may have rendered in that behalf; that the written agreement between them, and not any parol understanding, measured the rights and liabilities of the parties; that respondent was willing to live up to that agreement; that he had not obstructed Strayer in selling the property, and that he was still willing for him to make such sale, and to allow him one-half of the proceeds in excess of $8,500, in accordance with their written agreement.

On September 27, 1916, Taylor listed the farm with Kincheloe for sale. A few days later Kincheloe opened negotiations with Meloy, a prospective purchaser, for the sale of the farm, pending which, in addition to the constructive notice imparted by the *lis pendens*, both of them had actual notice from Taylor and his attorney of the pendency of the Strayer suit. On October 12, 1916, these negotiations culminated in a memorandum agreement to the effect that in consideration of $10 and other considerations therein mentioned, Taylor agreed to sell and convey to Meloy the farm for $10,500, $250 cash, $3,250 within sixty days, "or on date thereafter when deed is delivered (and certain stipulations with respect to residue of purchase money, etc.)" Then follow these provisions: "Whereas it is understood by both parties hereto that there is pending a certain suit in Fairfax county * * * covering the question of possession. Now, therefore, it is understood and agreed that said party of the first part is to deliver immediate possession of the above mentioned tract of land as soon as the aforesaid suit is either settled or dismissed, at which time the sale is to be closed." The concluding clause provided that in the event the first party did not deliver the possession of the farm he should reimburse the second party any and all sums paid on account of the purchase price, together with

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the further stipulated sum of $150 for any additional expense incurred in seeding the land. Interest, taxes and insurance were to be "adjusted to the date of transfer and closing." On the same occasion, Taylor, at the request of Meloy, who expressed a wish to put a crop on the land, delivered to him a written statement addressed, "To whom it may concern," that he had sold the farm to Meloy and that he was entitled to the possession of the same.

On October 17, 1916, Strayer, who was ignorant of the negotiations between Taylor and Meloy, secured from Creel a written agreement to purchase the farm at $12,000. Subsequently, Meloy and Kincheloe induced Creel to withdraw his offer of purchase upon a secret agreement that Meloy would consummate his purchase from Taylor and then sell to Creel for $12,000. On November 14, 1916, shortly after this arrangement between Meloy and Creel, these parties and Kincheloe each filed his petition in the case. Meloy's petition set out his contract with Taylor to purchase the farm at $10,750, and prayed that such orders might be entered as would give him a good title to the property; Kincheloe's petition asked that he be paid his commissions of $500 on the sale to Meloy; and Creel's petition withdrew his offer of $12,000 for the farm, and asked that Strayer be decreed to refund the $250 paid thereon. On December 8, 1916, Strayer served written notice on all the parties that he would move the court to confirm the sale of Creel. At the hearing of this motion, upon Creel's statement that he still desired to purchase the farm at $12,000, the judge dismissed all three of the petitions and confirmed the sale to Creel on the terms of his first offer. Finally, Meloy filed an additional petition praying for a personal decree against Taylor for $625, the difference betwen the sale to petitioner and the sale to Creel, which it was alleged Taylor would receive. Kincheloe also filed an additional petition in which he renewed his demand for his commissions. Both of these peti-

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tions were subsequently dismissed, but the former without prejudice to Meloy's right, if so advised, to litigate with Taylor the demand asserted therein.

The circuit court correctly construed the written contract of sale between Taylor and Meloy to be a conditional contract, only to become effective in the event Strayer was divested of possession and interest in the farm, stipulating on its face the damages to be paid Meloy should Strayer not be so divested. The court also rightly held that the confirmation of the sale to Creel rendered "null and void and of no effect" the contract between Taylor and Meloy, except to entitle Meloy to receive the $250 paid by him to Taylor, which sum had been tendered him by the latter.

We are of opinion that the circuit court properly determined the rights of Taylor and Strayer with respect to the Aspen Hill farm under the agreement of May 8, 1916; and, therefore, its rulings upon subordinate questions followed in natural and necessary sequence. Strayer was within his rights in invoking the aid of a court of equity to protect his interests under his contract; and the confirmation of the sale to Creel was within the pleadings and warranted by the evidence. In addition to the conditional character of the contract of sale between Taylor and Meloy, both Meloy and Kincheloe, at the threshold of the negotiations, were affected with both actual and constructive notice of the litigation between Strayer and Taylor, and of the rights and equities of Strayer in the farm. An examination of the record would have advised them that a court of equity had acquired jurisdiction of the parties and the subject matter, and that they would deal with the property at their peril. At best, Meloy was only a *pendente lite* purchaser, with actual and constructive notice of the pending suit, and took the property subject to any decree that might be rendered therein with respect to it, and Kincheloe occupied no higher ground. *Hurn* v. *Keller*, 79 Va. 415; *Nixdorf* v. *Blount*, 111

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Va. 127, 68 S. E. 258. Nor did appellants better their condition by attempting to stifle Creel's bid. Such aggreements are opposed to public policy and illegal. *Bolling* v. *Mullins*, 111 Va. 250, 68 S. E. 982.

The decrees complained of are without error and must be affirmed.

Affirmed.

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Wythe ville.

KING AND OTHERS V. HARTUNG.

June 13, 1918.

Absent, Burks, J.

1. LANDLORD AND TENANT—*Streets and Highways—Abutting Owners—Injury to Person in Street.*—Where a boy was rightfully in a street and was injured by the fall of a large gate, the falling of the gate being caused by negligent construction under the supervision of the landowners, the landowners are liable, and the fact that the premises were in the exclusive possession of a tenant was immaterial, the owners themselves having created the danger. The case is different if the tenant himself, without the authority or knowledge of the owner, creates a dangerous condition.
2. LANDLORD AND TENANT—*Streets and Highways—Abutting Owners—Injury to Person in Street.*—A property owner is bound at his peril to see that his premises are safe as to persons using the street upon which the premises abut.
3. LANDLORD AND TENANT—*Streets and Highways—Abutting Owners—Injury to Person in Street—Nuisances.*—Things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident.
4. INDEPENDENT CONTRACTORS—*Owner Exercising a General Supervision Over Work.*—Where a landowner, who has employed a competent workman to erect a gate, is present exercising a general supervision over the work, the employee is not an independent contractor.
5. INDEPENDENT CONTRACTORS—*Liability of Abutting Owner.*—Where a boy rightfully in a street is injured by a gate which opened out into the street falling upon him, the owner of the premises upon which the gate is situated is liable for injuries to the boy, although the gate was erected by an independent contractor and its fall was due to negligence in construction.

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6. STREETS AND HIGHWAYS—*Abutting Owners—Awnings—Other Parts of Building.*—In actions for injuries to passengers in streets, there is no reason for a distinction between the case of an awning projecting over a street and the case of any other part of a building, which, though not projecting over the street, is liable to fall upon it.

Error to a judgment of the Circuit Court of city of Portsmouth, in an action of trespass on the case. Judgment for plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

Frank L. Crocker, for the plaintiffs in error.

D. T. I'Anson and *J. W. Happer*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

A heavy wagon gate, opening into Duke street, in the city of Portsmouth, fell on Oscie Hartung, a boy five years of age, producing injuries for which he brought this action against James E. King and others, owners of the premises to which the gate was attached. There was a verdict and judgment below in his favor, and the defendants bring the case here for review.

The evidence which went to the jury showed, or tended materially to show, the following pertinent facts: T. B. Hartung, the plaintiff's father, was, at the time of the injuries complained of, and had been for some years prior thereto, occupying as a residence a house and lot situated at the corner of Duke street and Maple avenue, under a lease from the defendants. A large gate, affording an entrance to a wagon way from the yard to Duke street, was attached by hinges to the corner of a stable and opened out into the street. It was so adjusted that when opened it

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would swing back until it rested against the outer side of the stable, and was held there by its own weight. An old gate at the same place had worn out, and the one which fell on the boy was practically new, built and hung a few weeks prior to the accident. The contract of lease contained no agreement for repairs, and the defendants voluntarily agreed to renew the gate. To do this they employed an experienced and competent workman; but Mr. James E. King, one of the defendants, acting for himself and the others, was present during the greater part of the time while the work was in progress, and gave general directions in regard thereto. The post to which the gate was attached at the corner of the stable was partially decayed. Before it was renewed, Mrs. Hartung, the wife of the tenant and mother of the boy, told Mr. King that it would be "perfectly useless to put up that gate unless he put up a new post." After the work was completed, Mr. King inspected and accepted it. To all outside appearances the work seemed to have been well and properly done, but either because the nails were too small, or because of the defective condition of the post, or as a result of these conditions combined, the gate was not sufficiently supported. As one of the witnesses for the plaintiff said, nails of the kind used "would not or could not have held the gate securely."

On the morning of the accident, T. B. Hartung, who was a drayman, went out very early to his work, driving through the gate and leaving it open and resting against the side of the stable. Later on in the day, the boy, who was at the time driving a chicken out of the yard, ran out into the street opposite the gate, which just at that moment fell upon him, causing the injury for which this action was brought. An examination showed that the gate had pulled loose from the post.

There was a sharp conflict in the evidence as to the condition of the corner post and the sufficiency of the gate fast-

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ening, but this conflict must, under familiar rules, be resolved in favor of the verdict. There was also evidence on the part of the defendants tending to show that the gate had been struck at some time prior to the accident by the hub of a wagon wheel, which might have tended to render it insecure. This question also, however, was decided by the jury adversely to the defendants upon instructions which expressly told them to find for the latter if the gate fell from any cause over which the defendants had no control. There was abundant evidence upon which the jury might have found that the gate fell because of the negligent use of insufficient nails and timber for its support; and we shall presently see that the instructions as a whole were more favorable to the defendants than was warranted by the law.

The declaration rests solely upon the theory that the plaintiff occupied the relationship, not of a tenant or member of a tenant's family, but of a stranger to the owners of the property, and the right to a recovery is based upon an alleged breach of the duty of the defendants to keep their premises abutting on the street in such condition as not to result in injury to travelers. The relationship of landlord and tenant is not invoked or involved in the case.

At the time of the accident the boy was not on the premises, but was rightfully in the street, and the fact that the premises were in the exclusive possession of a tenant is immaterial. The owners themselves created the danger. See 13 R. C. L., section 349; *Hill* v. *Norton*, 74 W. Va. 428, 433, 82 S. E. 363, Ann. Cas. 1917 D, 489. The case is different in this respect when the tenant himself, without the authority or knowledge of the owner, creates a dangerous condition. See 16 R. C. L., section 593.

We are unable to differentiate this case in principle from the cases of *McCrorey* v. *Thomas*, 109 Va. 373, 63 S. E. 1011, 17 Ann. Cas. 373, and *McCrorey* v. *Garrett*, 109 Va. 645,

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64 S. E. 978, 24 L. R. A. (N. S.) 139, although the defendant in each of the latter was a lessee, who, instead of the landlord, had created the danger. It is true that both of the cases cited involve injuries resulting from awnings projecting over the street, while in the instant case the evidence does not clearly show that the gate, when entirely closed, or when open all the way back, projected to any extent over the street line. It did, however, open out over the street, and was so situated that, if it fell, either from a closed or an open position, it would fall upon the street. There can be, as we think, no rational distinction between a danger to the public from an awning which, so long as it remains in place, is absolutely harmless, even though it does project over the sidewalk, and such a danger from a gate, which, so long as it remains in place, is absolutely harmless, even though it does not project over the sidewalk; provided, in either case, if the object falls, it must fall on the street.

There is considerable confusion and conflict in the authorities as to whether abutting property owners are insurers of the safety of travelers against the dangerous condition of their premises.

The rule is thus stated in 1 Thompson on Negligence, section 1199: "The owner of property abutting on a highway is under a positive duty to keep it from being a source of danger to the public by reason of any defect in structure, repair, use or management which reasonable care can guard against. Reasonable care must be exercised by such owners to keep their buildings safe, to the end that they do not fall in whole or in part, or that objects do not fall over them, injuring passersby on the sidewalk or street; but such an owner is not a guarantor or an insurer of the absolute safety of the sidewalk, and proof of negligence on his part is necessary to charge him with liability for an injury received thereon."

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The case of *McCrorey* v. *Thomas*, *supra*, seems to have been tried under the rule as laid down above, namely, that the owner or occupier of property abutting on a street is not an insurer, and that his liability is to be tested by the ordinary rules applicable in negligence cases. In the instant case, although the declaration proceeds upon the theory that there was an absolute duty upon the part of the defendants to keep the premises safe as to travelers on the street, it appears from the course of the evidence and from the instructions to the jury that the case was tried upon the theory that they were not insurers and were only liable for negligence. Having already seen that there is no reason for a distinction between the case of an awning projecting over the street and the case of any other part of a building which, though not projecting over the street, is liable to fall upon it, the case of *McCrorey* v. *Thomas* becomes here absolutely controlling. The plaintiff's evidence, as shown, fully warranted the jury in finding that the gate had been negligently constructed. The only defense, therefore, which could possibly be made in this court against the correctness of the verdict, under the evidence and instructions, is that the defendants were not liable because they selected a competent contractor to do the work, and cannot be held liable for the consequences of his negligence. The evidence does not satisfactorily establish the contention that the gate was erected by an independent contractor because one of the defendants, acting for himself and the others, seems to have been present exercising a general supervision over the work; but assuming that the work was done by an independent contractor, that defense is not available in this case. In *McCrorey* v. *Thomas*, Judge Buchanan said (italics added):

"The awning had been erected by the independent contractor *and turned over by him to the defendant and accepted by him* a year or more before the plaintiff was in-

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jured; yet, by the instruction in question, the court was asked to tell the jury, in substance, that the defendant was not liable for the plaintiff's injury if the awning was erected by a competent, independent contractor and turned over to the defendant in apparently good condition, unless it further appeared that some defect existed in the awning at that time or subsequently developed therein which should have been discovered by the defendant in the exercise of ordinary care, or that the awning was negligently used or managed. In the event the jury had believed that the awning had been erected by a competent, independent contractor and accepted by the defendant from him in an apparently good condition, the instruction would have required the plaintiff, in order to recover, to prove that some defect existed in the awning at the time of the defendant's acceptance, or subsequently developed therein, which should have been discovered in the exercise of ordinary care, or that the awning was negligently used or managed. To have placed this burden upon the plaintiff in a case like this would have been clearly erroneous." See also *Gorham* v. *Gross*, 125 Mass. 232, 28 Am. Rep. 224.

The subsequent case of *McCrorey* v. *Garrett, supra*, goes a step further than the *Thomas Case* and holds that in this class of cases, the test of liability is not the lack of proper care on the part of the owner or occupier of the building, "but the fact of resulting injury, through no fault of his, to the party using the street." In that case Judge Harrison quotes with approval the following extract from Wood on Nuisances: "It would seem that all sign boards, cornices, blinds, awnings and other things projecting over a walk, *or so situated with reference thereto that if they fall they may do injury to travelers*, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident." (Italics added.) It

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is the clear result of the decision of this court in the *Garrett Case* that a property owner, where the facts are as here, is bound at his peril to see that his premises are safe as to persons using the street upon which the premises abut.

We may add that while this court in the *Garrett Case* held that owners or occupiers of abutting property are insurers of the safety of their premises as to passers-by on the street, and thus went further than in the *Thomas Case*, there is no necessary conflict between the two decisions, because in the *Thomas Case* it was not contended that the defendant was such an insurer, and, inasmuch as the plaintiff in that case recovered upon the theory of negligence and not upon the theory that the awning was a nuisance *per se*, there was no occasion, in affirming the judgment, to declare that the awning was *per se* a nuisance. It is apparent, however, upon reading Judge Buchanan's opinion in the *Thomas Case*, that he had in mind this distinction, which is the subject of much conflict in the authorities; and, with his usual accuracy, he shows that no issue was made in the case as to a nuisance *per se*.

It is manifest, therefore, that in the instant case the defendants were accorded a trial under a rule more favorable than they were entitled to under the decisions in this State.

There was no error in the judgment complained of, and it must be affirmed.

Affirmed.

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Wytheville.

LILLARD V. GRAVES AND OTHERS.

June 13, 1918.

Absent, Burks, J.

1. JUDICIAL SALES—*Setting Aside—Inadequacy of Price.*—Where the question before the trial court is the confirmation or setting aside of a judicial sale for alleged inadequacy of price, *ex parte* affidavits of landowners living in the vicinity, all of whom stated that the price was a fair one, may be considered by the court in opposition to the opinion of the commissioner that the price was inadequate.
2. JUDICIAL SALES—*Setting Aside—Inadequacy of Price.*—A judicial sale regularly and fairly made in compliance with the decree of sale, will not be disturbed upon the bare suggestion of inadequacy of price.
3. JUDICIAL SALE—*Setting Aside—Inadequacy of Price—Case at Bar.*—In the case at bar, it was error for the circuit court to set aside a judicial sale upon the opinion of the commissioner who made the sale, that the price obtained for the land was inadequate, wholly unsupported by evidence, against the presumption in favor of the highest bid as a just criterion of the value of the property, and the uncontradicted evidence afforded by the affidavits of fourteen responsible citizens and landowners, whose property either adjoined or lay in the immediate vicinity of the land in controversy, that it brought a fair price.
4. JUDICIAL SALES—*Setting Aside—Inadequacy of Price.*—It is error to set aside a judicial sale solely because after the sale an advanced bid of ten per cent. has been made.

Appeal from a decree of the Circuit Court of Madison county, setting aside a judicial sale. The purchaser at the sale appeals.

Reversed.

The opinion states the case.

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Chapman & Averill, for the appellant.

Will A. Cook, for the appellees.

WHITTLE, P., delivered the opinion of the court.

This suit was brought under section 2436-b of the Code by the life tenant against the remaindermen for the sale for reinvestment of 260 acres of land in Madison county, upon the allegation that it was located twenty miles from a railroad and was "more a burden than a source of profit." The assessed value of the property is $2,451.

With the acquiescence of the parties the court decreed a sale of the farm, at which sale appellant became the purchaser at the price of $10,500. The sale was fairly made after due advertisement, and in conformity to the decree. It was well attended, and, upon competitive bidding, the property was knocked down to appellant as the highest bidder at the price named. For alleged inadequacy of price, based upon the opinion of the commissioner and his recommendation that the sale be not confirmed, the court set aside the sale and decreed a resale of the land. After the expiration of the term at which this decree was rendered and notice of appeal had been given, an upset bid of $11,340 was offered. The party tendering the bid knew of the sale and states that his inability to raise the cash payment at the time of sale prevented his becoming a bidder. In a letter accompanying the record, his honor, the circuit judge, expressed the opinion that it was not proper for him to consider this upset bid under the circumstances.

As opposed to the opinion of the commissioner that the farm sold for an inadequate price, appellant submitted to the trial court the affidavits of fourteen land owners living in the vicinity, all of whom stated that $10,500 was a fair price for the property. It is insisted by appellees that the

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court could not consider these *ex parte* affidavits, but the practice in this jurisdiction is otherwise. *Robertson* v. *Smith*, 94 Va. 250, 252, 26 S. E. 579, 64 Am. St. Rep. 723. It has long been the course of decision in this court, when a sale has been regularly and fairly made in compliance with the decree of sale, not to disturb it upon the bare suggestion of inadequacy of price.

In *Effinger* v. *Ralston*, 21 Gratt. (62 Va.) 430, 436, Moncure, P., delivering the opinion of the court, said: "To induce a court to set aside a sale fairly made in pursuance of a decree, merely upon the ground of inadequacy of price, there ought to be a decided preponderance of evidence of such inadequacy, even if it be conceded that mere inadequacy of price is, in itself, a sufficient ground for setting aside such sale."

In *Langyher* v. *Patterson*, 77 Va. 470, it was held: "Public policy requires that purchasers at such sales should be entitled to certainty and security of their rights under their purchases, and that they should not be refused confirmation simply because they may have got a good bargain."

In *Hazlewood* v. *Forrer*, 94 Va. 793, 27 S. E. 507, it was held: "Where a judicial sale has been sufficiently advertised, well attended and fairly conducted, it should not be set aside for inadequacy of price merely because the bill, which was filed three years before the sale, charged that the property was worth a much larger sum than it brought at the judicial sale."

In *Moore* v. *Triplett*, 96 Va. 603, 32 S. E. 50, 70 Am. St. Rep. 882, it was held: "Whether a judicial sale should be confirmed or not depends upon the circumstances of the particular case. The court should exercise a sound legal discretion with a view to fairness, prudence, and just regard to the rights of all concerned. The action of the court should be such as to induce bidders to attend, and to encourage fair, open and competitive bidding in order to obtain the

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highest possible price and inspire confidence in the stability of judicial sales."

Upon the authority of these decisions the decree under review cannot be sustained. The circuit court was controlled alone by the opinion of the commissioner who made the sale, wholly unsupported by evidence, against the presumption in favor of the highest bid as a just criterion of the value of the property (*Todd* v. *Gallego Mills,* 84 Va. 591, 5 S. E. 676; *Nitro-Phos. Syndicate* v. *Johnson,* 100 Va. 774, 42 S. E. 995; *Benet* v. *Ford,* 113 Va. 442, 74 S. E. 394), and the uncontradicted evidence afforded by the affidavits of fourteen responsible citizens and land owners, whose property either adjoined or lay in the immediate vicinity of the land in controversy, that it brought a fair price.

The following holdings in *Benet* v. *Ford, supra,* are pertinent to the present case: "Where the action of the court in confirming the sale of property under its control is complained of because of the inadequacy of the price, the burden is on the complaining party to show that he has been injured."

"If the grounds relied on for setting aside a judicial sale go to the very substance of the contract, such as fraud, accident, mistake, or misconduct on the part of the purchaser or other person connected with the sale, which has worked injustice to the party complaining, the rule governing in determining whether or not the sale shall be confirmed is very different from the rule controlling where the question is whether the price at which the property sold is entirely inadequate."

"The highest bid made at an open judicial sale, fairly conducted, after full notice, in the face of such competition as can be attracted, is a fair and just criterion of the value of the property at that time. After-stated opinions, affidavits of under-value, and the like, are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction and its results."

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The case of appellees would not be helped if the upset bid tendered after the term at which the decree was entered were considered. The advance bid was made by one cognizant of the time and place of the sale, and does not amount to *ten per cent.* of appellant's bid. The later decisions of this court are all to the effect that it is error to set aside a judicial sale solely because an advance bid of ten per cent. has been made. *Litton* v. *Flanery,* 116 Va. 710, 82 S. E. 692, and cases cited.

The decree complained of must be reversed, and the case remanded with instructions to the circuit court to enter a decree confirming the sale made to appellant.

Reversed.

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Wytheville.

LYNCHBURG TRACTION AND LIGHT COMPANY v. GORDON.

June 13, 1918.

Absent, Burks, J.

1. APPEAL AND ERROR—*Conflicting Evidence—Affirmance.*—In the instant case, upon the vital questions of fact, the evidence was irreconcilably conflicting. The conflict arose, however, from two opposing versions of possible facts under which the accident occurred. Either version might have been true, and the selection of the more credible one was exclusively within the province of the jury. No physical laws or facts prevent the acceptance of the testimony upon which the plaintiff sought and obtained the verdict, and the Supreme Court of Appeals could not, therefore, apply to the case, as defendant earnestly insisted it should, the rule of evidence applicable in cases where the court must either disregard the testimony, or accept the impossible as true.
2. MASTER AND SERVANT—*Electricity—Injury to Lineman—Fellow Servants—Reliance on Vice-Principal's Statement.*—Where the testimony of an assistant foreman himself left no doubt that he was a vice-principal, and that it was his duty to decide whether the electric current should be cut off, and, therefore, primarily his duty to know whether it was on or off at a given time and place, the plaintiff, a lineman, had the right to rely upon the assistant foreman's statement that the current was cut off when the foreman ordered him to cut a wire which, when connected with the power plant, carried a dangerously heavy electric current, and the question as to whether rubber gloves or other instrumentalities for use in cutting live wires were available to plaintiff and should have been used by him, is immaterial.
3. MASTER AND SERVANT—*Electricity—Injury to Lineman—Fellow Servants—Reliance on Vice-Principal's Statement—Burden of Proof.*—Where an assistant foreman, whose testimony showed him to have been a vice-principal, ordered the plaintiff, a lineman, to cut a wire, assuring him that there was no current

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upon the wire, and the plaintiff, relying upon this assurance, took hold of the wire with his naked hands and was injured, plaintiff might recover against his master. But the burden of proving the above facts to the satisfaction of the jury was upon the plaintiff.

4. MASTER AND SERVANT—*Electricity.*—If a servant, an experienced lineman, working about highly charged wires of the defendant daily and knowing how to handle them, was ordered by his foreman to kill a wire, without any assurance whether the current was on or off, he could not recover where he took hold of the wire with his naked hand and was injured.

5. MASTER AND SERVANT—*Vice-Principal—Electricity—Assumption of Risk.*—If an assistant foreman, in the discharge of a non-assignable duty, assured the plaintiff, a lineman, that a wire was dead, there was nothing upon which the doctrine of assumed risk or shifting conditions could rest.

6. VARIANCE—*Appeal and Error—Question Raised for First Time on Appeal.*—An objection that the trial court erred in permitting the plaintiff to recover upon a different case from that made by his declaration, cannot be made for the first time on appeal, as it involved the ordinary question of a variance between the declaration and the proof.

Error to a judgment of the Corporation Court of city of Lynchburg, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Caskie & Caskie, for the plaintiff in error.

Volney E. Howard and *H. C. Featherston*, for the defendant in error.

KELLY, J., delivered the opinion of the court.

We will designate the parties here according to their position in the court below. The plaintiff, H. N. Gordon, while in the employment of the defendant, the Lynchburg Traction and Light Company, was severely injured by contact with

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a heavily charged electric light wire, and brought this action alleging that his injuries were caused by the defendant's negligence. There was a verdict and judgment in his favor.

Upon the vital questions of fact, the evidence is irreconcilably conflicting. This conflict arises, however, from two opposing versions of possible facts under which the accident occurred. Either version might have been true, and the selection of the more credible one was exclusively within the province of the jury. No physical laws or facts prevent the acceptance of the testimony upon which the plaintiff sought and obtained the verdict, and we cannot, therefore, apply to the case, as defendant earnestly insists we should, the rule of evidence applicable in cases where the court must either disregard the testimony, or accept the impossible as true. As Judge Keith said, in *Atlantic Coast Line R. Co.* v. *Newton*, 118 Va. 222, 231, 87 S. E. 618, 622: "We find here no ground for applying the doctrine that courts cannot accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated and may, therefore, be said to be incapable of proof. * * * We have here the ordinary case of a conflict of testimony, which it was the province of the jury to solve."

Dealing with the case, therefore, as we must, upon the evidence which materially tended to support the plaintiff's theory, and disregarding the evidence in conflict therewith, we find the following pertinent facts:

The defendant maintained and operated in the city of Lynchburg an electric light and power plant. The plaintiff was a lineman and had been employed as such by the defendant for about eight months. On the morning of the accident, he was engaged with other linemen in the work of changing the electric light lines from one side of Park avenue over to the other side. These men were not at that time engaged in the work of inspection and repair, but were

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constructing a new line which they had about completed on the side of Park avenue opposite to the old line, and the plaintiff was injured while in the act of cutting the old wires preparatory to making a new connection on the other side of the street. The gang of men to which the plaintiff belonged was employed by and subject to the general supervision and control of a chief foreman named Fisher. An assistant foreman, A. J. James, was in immediate charge of the gang, and, in the absence of Fisher acted also in his stead. James was present and Fisher was absent at the time of the accident. The plaintiff was temporarily detained at the defendant's office that morning in connection with some other work he had been doing the day before, and did not go out with the other members of his gang, but arrived after they had been at work about an hour. Upon his arrival, he assisted in digging a post hole and setting a post, and was then ordered by James to get his tools, go up the pole to which the old line was attached, and cut a wire which, when connected with the power plant, carried a dangerously heavy electric current. The plaintiff's statement as to what then occurred, corroborated by a substantially similar statement of his brother, C. D. Gordon, appears from the following question and answer:

"After he told you that, what did you do, did you go up the pole?

"Yes, sir, I went up and he told me to cut this wire, this pole pin wire, and hold it, cut and hold it and throw it back over the span wire that holds up the trolley and I asked him, 'Is this wire dead?' and he said, 'Yes.' Of course, I did not grab hold of it then and I asked him over again and he said, 'Yes, cut it and hold it and throw it over the span wire to keep it from hitting the span wire and flying over on the trolley,' and I cut it and after I reach out and cut it that is the last thing I remember."

The foreman, James, denies this statement, insists that

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as he knew the wire was alive, he certainly would not have said, and did not say, that it was dead; and claims that he told the plaintiff the wires "were working," and he must "kill them" and be careful. In this James is corroborated by the testimony of all the other members of the gang except the plaintiff and C. D. Gordon. The jury, however, accepted the plaintiff's version.

It appears from plaintiff's evidence that there was a "tap" about 600 feet back of the point of the accident, and that the wire which the plaintiff was ordered to cut was connected with the main line and received its current through this tap. The defendant did not observe any regular or uniform rule or custom in that regard, but according to plaintiff's evidence it was not unusual when such wires were to be cut, especially when permanent changes in the line were being made, to cut the current off at the tap. This of course rendered the operation of cutting the wire entirely safe. There were also means of avoiding the danger when the current was on, such as the use of rubber gloves or the employment of a device known as a "come-along." Whether the current should be cut off at the tap in any case, was a question which the defendant left to the judgment of the foreman. The testimony of James himself seems to us to leave no room to doubt that in this particular he, in the absence of Fisher, was the *alter ego* of the defendant, and that it was his duty to decide whether the current should be cut off, and, therefore, primarily his duty to know whether it was on or off at a given time and place. In this respect he was a vice-principal, and the plaintiff had the right to rely upon his statement that the current was off. This being true, the question discussed to some extent before us as to whether rubber gloves or other instrumentalities for use in cutting live wires were available to plaintiff and should have been used by him, is immaterial. The wire would have been harmless and the plaintiff could with

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perfect safety have done exactly what he did do if the foreman's alleged statement had been true.

Taking the view of the case above indicated, the learned judge of the trial court instructed the jury as follows:

1. "The court instructs the jury that if they believe from the evidence that James ordered the plaintiff to ascend the pole near the intersection of Euclid and Park avenues, and cut the primary wire, that at the time the said James assured the plaintiff that there was no current upon said wire, and the plaintiff, relying upon said assurance, took hold of the said wire with his naked hands, and was injured, then they must find for the plaintiff, but the burden of proving the above facts to the satisfaction of the jury is upon the plaintiff."

2. "The court instructs the jury that if they believe from the evidence that the plaintiff was an experienced lineman, working about highly charged wires of the defendant daily and knew how to handle same, and that the foreman James, on the occasion of the injury, instructed him to go up the pole, and kill the wire, without any assurance about the current, then they must find for the defendant."

These instructions, we think, were correct; and the verdict of the jury in favor of the plaintiff's theory is the end of the case.

It is urged that the court erred in giving the foregoing instructions to the exclusion of the defendant's theory that the plaintiff assumed the risk, and its further theory that the injury resulted from the shifting conditions arising in the progress of the work. We are of opinion, however, that the instructions given by the court necessarily covered the entire case and gave the defendant the benefit of every proper defense. If the foreman, in the discharge of a non-assignable duty, assured the plaintiff that the wire was "dead," there was nothing upon which the doctrine of assumed risk or shifting conditions could rest. If he did not

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give such assurance, then under instruction number two the jury were obliged to find for the defendant.

It is also insisted that the trial court erred in permitting the plaintiff to recover upon a different case from that made by his declaration, the contention being that the declaration relied solely upon an alleged previous custom of disconnecting the current, while the plaintiff's evidence attempted to develop a case of liability on the ground of a specific assurance and order given by a vice-principal. This point, which does not appear to have been made in the lower court, involves the ordinary question of a variance between the declaration and the proof. We need not stop here to inquire whether there was such a variance as to have constituted a valid objection to the evidence when offered. The objection cannot be raised for the first time in this court. *Va. & S. W. R. Co.* v. *Bailey*, 103 Va. 205, 228, 49 S. E. 33.

We find no error in the record, and the judgment must be affirmed.

Affirmed.

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Wythville.

MALLORY v. THE VIRGINIA COLONY FOR THE FEEBLE-MINDED.

June 13, 1918.

1. INSANITY—*Feeble-mindedness—Acts 1916, page 662, et seq.*—Under the Acts of Assembly of 1916, page 662, *et seq.*, defining feeble-mindedness and providing for the examination, commitment and custody of feeble-minded persons, there was filed before the judge of the Hustings Court of the city of Richmond a report in writing of a "commission" which purported to have been composed of the persons designated in section 3 of said statute, setting forth the testimony before the "commission" and its finding that the petitioner "is feeble-minded and ought to be confined in an institution for the feeble-minded," as stated in such report, and the judge based the order complained of, committing the petitioner to the custody and control of the defendant, upon such report. The Supreme Court of Appeals was of the opinion that if such report had been accompanied by such a record as would have shown that the "commission" had jurisdiction to make it, that the report might be treated as substantially the "petition" to the judge required by section 4 of said statute, and the said judge would have had jurisdiction to enter the order complained of upon such report.
2. INSANITY—*Feeble-mindedness—Acts 1916, page 662, et seq.*—The statute does not contemplate that the judge should try the issue whether the alleged feeble-mindedness exists or not. The "commission" is the tribunal created by the statute for the trial of such issue.
3. INSANITY—*Feeble-mindedness—Acts 1916, page 662, et seq.—Jurisdiction of Commission.*—The statute prescribes a certain procedure to be followed in order to confer jurisdiction on the commission to make the inquiry and report. Some procedure giving notice to the person proceeded against is essential to the due process of law which is guaranteed to every person by the fourteenth amendment to the Federal Constitution, and had the statute not provided for some such procedure, it would have been itself null and void because unconstitutional. However, the statute under consideration does provide for due pro-

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cess of law, in that it requires that the proceeding shall be inaugurated by a petition "setting forth under oath the circumstances indicating the feeble-mindedness of the person named," and containing other statements such as are specified in section 2 of the statute. Then the issuance of a warrant for the alleged feeble-minded person and a summoning of the persons named in the petition is required by section 3 of the statute. And by section 4 of the statute an appeal is given to the person accused of feeble-mindedness to the Supreme Court of Appeals, following the disposition of the case by the circuit or corporation court, or judge thereof.

4. INSANITY—*Feeble-mindedness—Acts 1916, page 662, et seq.—Substantial Compliance with Statute.*—A substantial compliance with the requirements as to procedure is essential to the jurisdiction of the commission and of the court, judge or justice. The whole proceeding in such a case is statutory, and, in analogy with the well understood doctrine touching the special jurisdiction of courts conferred by statute, the statutory requirements as to procedure are jurisdictional and must be at least substantially complied with, otherwise any order entered in the case will be null and void.

5. INSANITY—*Feeble-mindedness—Acts 1916, page 662, et seq.—Substantial Compliance with Statute—Case at Bar.*—In the case at bar, there was no petition under oath inaugurating the proceeding, and there was no warrant issued for the alleged feeble-minded person. Therefore, the procedure was not a substantial compliance with the requirements of the statute, and the order of court under which the defendant justified its custody and control of the petitioner, the alleged feeble-minded person, was null and void.

Petition for writ of *habeas corpus*.

Petition granted.

The opinion states the case.

Smith & Smith and *R. W. Ivey*, for the petitioner.

Caskie & Caskie, for the respondent.

PER CURIAM:

The proceeding in this case raises the single question, whether the judge of the Hustings Court of the city of Rich-

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mond had jurisdiction of the person of the petitioner so as to empower the former to enter the order of October 31, 1917, under which the defendant holds its custody and control of the petitioner. The decision of this question depends upon the proper construction of Acts of Assembly, 1916, page 662 *et seq.*, entitled "An act to define feeble-mindedness and to provide for the examination, legal commitment, and the custody and care of feeble-minded persons, and their segregation in institutions."

This statute provides: "That the words 'feeble-minded person' in this act shall be construed to mean any person with mental defectiveness from birth, or from an early age, but not a congenital idiot, so pronounced that he is incapable of caring for himself or managing his affairs, or of being taught to do so, *and is unsafe and dangerous to himself and to others and to the community*, and who consequently requires care and supervision and control *for the protection and welfare of himself, of others and of the community*, but who is not classible as an 'insane person' as usually interpreted." (Italics supplied.)

Under this statute, the judge who entered the order aforesaid was given jurisdiction to enter it upon the *ex parte* petition of the "commission" provided for in the statute. (See section 4 of such statute.) In the case before us (omitting mention of an invalid commitment of the petitioner to the custody of the superintendent of the poor, not involved in the issue before us) there was filed before the said judge a report in writing of a "commission" which purported to have been composed of the persons designated in section 3 of said statute, setting forth the testimony before the "commission" and its finding that the petitioner "is feeble-minded and ought to be confined in an institution for the feeble-minded," as stated in such report; and said judge based the order complained of upon such report. Now if such report had been accompanied by such a

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record as would have shown that the "commission" had jurisdiction to make it, we are of opinion that the report might be treated as substantially the "petition" to the judge required by section 4 of said statute, and the said judge would have had jurisdiction to enter the order complained of upon such report.

We are of opinion that the statute aforesaid does not contemplate that the said judge should have tried the issue whether the alleged "feeble-mindedness" existed or did not exist. The "commission" is the tribunal created by the statute for the trial of such issue. The powers of such judge are limited and are set forth in section 4 of the statute.

But the statute prescribes a certain procedure to be followed in order to confer jurisdiction on the "commission" to make the inquiry and "report" aforesaid. It requires that in order to inaugurate the proceeding leading up to said inquiry and "report," a petition must be filed, before the court, judge or justice designated in the statute, raising the issue of fact aforesaid and giving "the names and financial condition of the persons, if any, having the custody and control, and the parents, guardians and brothers and sisters, if any, of the alleged feeble-minded person." And the statute further provides that, "Thereupon it shall be the duty of the judge or the justice with whom said petition is filed, to issue a warrant ordering such alleged feeble-minded person to be brought before him and summon the persons named in the petition and such other persons as may be deemed competent to testify to the condition and circumstances of the alleged feeble-minded person, including two physicians * * *" etc.

Now, so far as the summoning of persons aforesaid is concerned, such procedure is manifestly not for the purpose of making them parties to the cause, but merely for

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the purpose of thoroughly investigating the facts of the case and to obtain all the evidence reasonably obtainable bearing upon the issue of fact aforesaid to be adjudicated by the "commission," namely, whether the alleged feeble-mindedness does or does not exist, and also bearing upon matters concerning which the said judge had power to act under section 4 aforesaid. The statute under consideration does not provide as does the statute concerning "dependent or neglected" children who are not charged with any crime or with being a menace to the public welfare (Acts 1914, page 696 *et seq.*) that, "The parent or guardian * * *" etc., shall be "notified of the proceeding." The guardian mentioned in the statute involved in the instant case is not a guardian *ad litem*.

In the instant case the "commission" would have had jurisdiction to have made the inquiry and report if the alleged feeble-minded person had been brought in person before such "commission" upon a warrant issued in accordance with an application of a petition such as the statute first above named requires to inaugurate the proceeding. The public welfare is involved in such a case. The same principle is involved as in a criminal case, where no notice to parent or guardian of an infant accused of crime is needed to confer jurisdiction on the court to take the infant into custody and try him for the offense of which he may stand charged. But, as in a criminal case so in the instant case, some procedure giving the accused person proceeded against information of the nature of the accusation against him (whether such person be an infant or an adult is immaterial) is essential to the due process of law which is guaranteed to every person by the fourteenth amendment to the Federal Constitution. And had the statute under consideration not provided for some such procedure, it would have been itself null and void because unconstitutional.

However, the statute involved in the instant case does

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provide for due process of law, in that it requires that the proceeding shall be inaugurated by a petition "setting forth under oath the circumstances indicating the feeble-mindedness of the person named," and containing other statements such as are specified in section 2 of the statute. Then the issuance of a warrant for the alleged feeble-minded person and a summoning of the persons named in the petition is required by section 3 of the statute. And by section 4 of the statute an appeal is given to the person accused of feeble-mindedness to the Supreme Court of Appeals, following the disposition of the case by the circuit or corporation court, or judge thereof.

We are of opinion that a substantial compliance with the aforesaid requirements as to procedure was essential to the jurisdiction of the "commission" and of the said judge in the case before us. The whole proceeding in such a case is statutory, and, in analogy with the well understood doctrine touching the special jurisdiction of courts conferred by statute, the statutory requirements as to procedure are jurisdictional and must be at least substantially complied with, otherwise any order entered in the case will be null and void.

In the instant case there was no petition under oath inaugurating the proceeding, and there was no warrant issued.

We are compelled, therefore, to the conclusion that the procedure was not a substantial compliance with the requirements of the said statute involved, and that the order of court under which the defendant justifies its custody and control of the petitioner was null and void. Hence, the prayer of the petition will be granted.

Petition granted.

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Wytheville.

PENNSYLVANIA RAILROAD COMPANY v. JENKINS.

June 13, 1918.

Absent, Burks, J.

1. APPEAL AND ERROR—*Law of the Case.*—If there have been two appeals of a case, between the same parties, and the facts are similar, nothing decided on the first appeal can be re-examined on the second appeal.

2. CARRIERS OF PASSENGERS—*Contributory Negligence—Employe with Dead Engines—Case at Bar.*—Plaintiff was an employee of a locomotive works and was accompanying two dead locomotives, new engines, moving on their own wheels as freight, from Richmond, Virginia, to Chicago, Illinois, the two dead engines forming parts of a long through freight train. Upon a stoppage of the freight train, plaintiff hurriedly alighted from his engine immediately next to one of the main line passenger tracks of the company, upon which from his knowledge and experience of twenty years as a locomotive engineer he must have known that trains were likely to pass at any moment, and as to which danger he had been cautioned twice upon that very morning. Plaintiff was struck by a passenger train just as he stepped from his dead engine, or he was struck just before he straightened up, after making an examination of the engine for the purpose of discovering whether it would be necessary because of the hot boxes to take it out of the train. The physical facts showed that plaintiff could not have looked, because if he had he would have seen the rapidly approaching passenger train which injured him.

   Held: That plaintiff was guilty of such gross negligence that he could not recover.

3. NEGLIGENCE—*Contributory Negligence—Last Clear Chance—Case at Bar.*—In the instant case, an instruction upon the theory that the doctrine of discovered peril or the last clear chance might be applied by the jury was clearly erroneous, as appears from all of the accounts given of the accident by the plaintiff himself. It is manifest that if he was struck just as he stepped from his engine, there was no opportunity to save him from

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the consequences of his own negligence. It is equally evident that while a part of his body was across the rail and his head under the engine, a large part, if not all, of his body must have been concealed by the overhang of the tender and freight cars from the engineer of the approaching train on the parallel track, and that when he suddenly got up from under the engine in front of the passenger train by which he was immediately struck there was then no possible chance to save him from the consequences of his own negligence.

Error to a judgment of the Hustings Court, Part II, of city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Eppa Hunton, Jr., and *Thos. B. Gay*, for the plaintiff in error.

O'Flaherty & O'Flaherty, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This case is before this court for the second time. *Pennsylvania Railroad Co.* v. *Jenkins*, 119 Va. 186, 89 S. E. 96. The opinion announced the well established doctrines, that the plaintiff, Jenkins, who was in charge of a dead engine composing part of a freight train, even though he was a passenger, was not relieved from the obligation to use ordinary care for his own safety, and that if his own negligence proximately contributed to his injury there could be no recovery. It was further determined that it was clear from the physical facts shown by the record that if the plaintiff had looked and listened, he would necessarily have known of the approach of the train which inflicted the injury complained of, and that his negligence was accentuated by his admission that he did

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not look for and did not hear the approaching train. The first verdict was set aside and the judgment thereon in his favor was therefore reversed, and the case was remanded for a new trial, if the plaintiff should be so advised. Upon the second trial there was another verdict and judgment in favor of the plaintiff, to which this writ of error was allowed.

It is unnecessary to repeat the clear statement of facts appearing in the former opinion. They are substantially similar to the facts appearing upon the second trial now before us for review. This being true, the doctrine of the law of the case is applicable—that is, if there have been two appeals of a case, between the same parties, and the facts are similar, nothing decided on the first appeal can be re-examined on the second appeal. *Steinman* v. *Clinchfield Coal Corporation*, 121 Va. 611, 93 S. E. 684.

The only possible ground upon which it can be suggested that the facts are not substantially the same grows out of the variance in the testimony of the plaintiff himself on the two trials. Upon the first trial he said that he did not see the train which injured him, although it was a clear morning and the track was straight for a mile and a half. When asked whether he looked, he said: "Well, I can't say that I did; because if there had been a train I probably would have seen it; I don't know that I did look; I jumped right down and went under my engine. I was going right ahead." Upon the second trial, having first testified that he did look, he explains his inconsistency and contradiction by saying, that after thinking it over he remembers that he saw a large force of section hands thirty or forty feet south of the track upon which his dead engine was standing and east of that point in the direction from which the train that injured him came, and finally makes this answer: "I got to thinking over this thing. I had never been in court before; the last time I was here was the first time I was

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ever in court in my life, and I tried to tell the facts just as near as I could, and I believed at the time I was making that statement it was so, but since then I recalled, and it has come to my mind that I did see—I could not possibly have seen those men unless I had turned east and looked at them." Then upon further cross-examination, upon being asked to explain why he told the jury on the former trial that if he had looked he would have seen the train, and then told the second jury that he did look and did not see it, he replies: "All I have got to say in answer to that question is this, that when I made that statement it was all right, and is true; that statement is all right; I do not go back on that at all. Q. It is true then? A. Yes, it is true, in part, as far as it goes; but I have thought over this matter, as well as other people think over things, and I have had a chance to think over and remember things that I did not remember at that time. There are lots of things that have happened in this case that I did not remember at that time that I have remembered since—lots of things."

When it is remembered that the record shows that seventeen days after the accident he stated in writing that he was struck by the train on the next track just as he stepped off of the dead engine; that on the first trial, the 5th day of February, 1915, about twenty-one months after the accident he testified that he did not look; and that on the second trial, on the 16th day of February, 1917, three years and nine months after the accident, he testified as is above recited, it becomes apparent that his memory as to the occurrence is unreliable. It is inexorably true, as he himself said upon the first trial, and as heretofore determined by this court, that the physical facts show that he could not have looked, because if he had he would have seen the rapidly approaching passenger train which injured him. The evidence demonstrates beyond a peradventure that he hurriedly alighted from his engine immediately next to one of

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the main line passenger tracks of the company, upon which from his knowledge and experience of twenty years as a locomotive engineer he must have known that trains were likely to pass at any moment, and as to which danger he had been cautioned twice upon that very morning.

According to the testimony, the accident happened in one of two ways: (a) either the plaintiff was struck by the passenger train just as he stepped from his dead engine, as stated by him in writing shortly after the accident; or (b) he was struck just before he straightened up, after having suddenly stepped from his engine, just as the freight train stopped, and gone forward a few paces, then down on his knees, with his head and a part of his body across the rail under the dead engine, and looked upward for the purpose of discovering whether it would be necessary because of the hot boxes to take the dead engine out of the train, or whether he could safely proceed with it upon his journey; and that this happened in such a short time that he might say that he was struck just as he got off of his engine.

In either view, he was guilty of such gross negligence that he cannot recover.

The court, upon the second trial gave an instruction upon the theory that the doctrine of discovered peril or the last clear chance might be applied by the jury to this case. This we think was clearly erroneous, as appears from all of the accounts given of the accident by the plaintiff himself. It is manifest that if he was struck just as he stepped from his engine, there was no opportunity to save him from the consequences of his own negligence. It is equally evident that while a part of his body was across the rail and his head under the engine, a large part, if not all, of his body must have been concealed by the overhang of the tender and freight cars from the engineer of the approaching train on the parallel track, and that when he suddenly got up from under the engine in front of the passenger train

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by which he was immediately struck there was then no possible chance to save him from the consequences of his own negligence.

If authority is needed to support propositions so clear and well settled, it is sufficient to refer to *Berkley St. Ry. Co.* v. *Simpson*, 106 Va. 548, 56 S. E. 331; *N. & W. Ry. Co.* v. *Strickler*, 118 Va. 153, 86 S. E. 824; *Va. & S. W. Ry. Co.* v. *Skinner*, 119 Va. 846, 89 S. E. 887; *Southern Ry. Co.* v. *Mason*, 119 Va. 263, 89 S. E. 225.

Other legal questions arising under the instructions and the alleged variances between the allegations and the proof are raised, but in our view no good purpose would be served by discussing them.

The judgment will, therefore, be reversed and the case remanded to be further proceeded with according to law.

Reversed.

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Wytheville.

THE PLANTERS BANK OF FARMVILLE v. COUNTY OF PRINCE EDWARD.

June 13, 1918.

Absent, Burks, J.

1. TAXATION — *Municipal Corporations — County Road Tax.*—An owner of property, whose place of business and all its property is located within the limits of a municipal corporation, which maintains its own streets, and which by charter provision was constituted a separate road district, and persons and property therein relieved from payment of taxes and levies for county road purposes, provided it kept its own streets in order, is exempted from a county road tax on his property within the municipality.

Error to a judgment of the Circuit Court of Prince Edward county, affirming on appeal an order of the board of supervisors of Prince Edward county imposing a tax upon the property of the plaintiff in error.

Reversed.

The opinion states the case.

E. Warren Wall, for the plaintiff in error.

A. D. Watkins, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This writ of error is to the judgment of the Circuit Court of Prince Edward county, affirming on appeal an order of the board of supervisors imposing a tax of twenty cents

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on the $100 upon the property of the plaintiff in error for county road purposes.

It appears that petitioner's place of business and all its property is located within the limits of the town of Farmville, a municipal corporation which maintains its own streets; and by charter provision (act of the General Assembly approved February 10, 1890, c. 196) the town was constituted a separate road district, and persons and property therein relieved from payment of taxes and levies for county road purposes, provided it kept its own streets in order. This law was in force when the tax complained of was levied by the board of supervisors, and the town was complying with the requirement that it should maintain its own streets. By the terms of Code, 1904, sec. 944-a, cl, 11, (as amended by Acts 1915, ch. 86), the property within the town was exempted from the tax in question. The case is ruled by *Watkins* v. *Barrow*, 121 Va. 236, 92 S. E. 908, and *Barrow* v. *Prince Edward County*, 121 Va. 1, 92 S. E. 910, where the contentions here made were resolved adversely to defendant in error.

Reversed.

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Wytheville.

QUEENSBURY AND OTHERS v. VIAL AND OTHERS.

June 13, 1918.

1. WILLS—*Probate—Judgment of Clerk.*—The clerk in admitting a will to probate acts in a judicial capacity, and the order made by him admitting or rejecting the will is as much a judgment as though entered by a court. His judgment is a judgment *in rem* whose validity can be drawn in question only by appeal in the manner and within the time prescribed by law. It cannot be collaterally assailed.
2. WILLS—*Probate—Judgment of Clerk—Case at Bar.*—The judgment of the clerk entered in the instant case with reference to the paper offered as a will was that "the clerk doth admit the same to probate as and for the last will and testament of" the testatrix. The adjudication of the clerk that the paper is the true last will and testament of the testatrix was an adjudication not only that the will was duly executed, but of all other questions necessary to the validity of the testamentary act, and this adjudication could not be assailed except in the manner pointed out by the statute. If for any cause the appellants desired to contest that adjudication the statute gave them an appeal of right within one year. This appeal, if taken, would have transferred the case to the circuit court of the county, and the statute declares that when so transferred the court should hear and determine the matter as if it had been presented to said court in the first instance, that is to say, there would have been a trial *de novo*. Section 2542, Code of 1904, provides how such trials shall be conducted.
3. WILLS—*Probate—Jurisdiction of Equity.*—Courts of equity have no inherent jurisdiction to set aside wills on the ground of fraud, undue influence, or lack of testamentary capacity on the part of the testator. Jurisdiction of these questions is to be found solely in the statute on the subject. Code 1904, section 2544.
4. WILLS—*Probate—Devisavit Vel Non.*—A bill praying for an issue *devisavit vel non* cannot be filed where the will has been admitted to probate before the clerk and no appeal has been

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taken, nor can it be filed where the persons interested in the probate have been summoned and contested the validity of the will.

Appeal from a decree of the Circuit Court of Chesterfield county. Decree for defendants. Complainants appeal.

Affirmed.

The opinion states the case.

O'Flaherty, Fulton & Byrd, for the appellants.

Haskins Hobson, for the appellees.

BURKS, J., delivered the opinion of the court.

The will of Elizabeth W. Rudolph was admitted to probate before the clerk of the Circuit Court of Chesterfield county, in his office, on January 15, 1915. No appeal was taken from the order of probate, but in October, 1916, the present suit was brought by the appellants to set aside and annul the will on the ground of lack of mental capacity to make a will, and of undue influence exerted over the testatrix by Hilda H. Vial, who was the sole legatee and devisee under the will. The bill charges that the paper admitted to probate "is not in fact the will of the said Eliza W. Rudolph, for the reason that she was not of sound and disposing mind and memory because of her extreme age, and the undue influence exerted upon her by the said Hilda H. Vial in her interest, and that the said paper does not represent the true will of the said Eliza W. Rudolph." And the prayer of the bill is, amongst other things, that the paper so admitted to probate as her will "be declared invalid and of no effect, and be decreed not to be the last will and testament of the said Eliza W. Rudolph, and that the same be set aside and annulled . . . and that an issue out of chancery

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be had." The bill was filed by some of the next of kin of the testatrix, and the only defendants thereto were Hilda Vial and her husband. The defendants demurred to the bill, and their demurrer was sustained, and the bill dismissed at the cost of the complainants. From that decree this appeal was taken.

The principal ground of the demurrer was that, as no appeal had been taken from the order of probate, the court of chancery was without jurisdiction to entertain the bill. The authorities chiefly relied upon to sustain the demurrer was *Saunders* v. *Link*, 114 Va. 285, 76 S. E. 327; *Ramsey* v. *Dodd*, 114 Va. 295, 76 S. E. 315; *Tyson* v. *Scott*, 116 Va. 243, 81 S. E. 57. We might content ourselves with simply affirming the decree of the court below upon the authorities cited, as we regard them as conclusive of the instant case, but for the fact that counsel for the appellants in the petition for the appeal state, "that if such is the understanding of these decisions they should be reviewed and made clear."

The opinion of Judge Whittle in *Saunders* v. *Link*, *supra*, is so clear and satisfactory, and so well supported by authority, that we hesitate to attempt to make it clear lest in the attempt we should obscure that which appears to us to be so plain.

As said in *Gooch* v. *Suhor*, 121 Va. 35, 92 S. E. 843, "the probate jurisdiction of clerks and of the Virginia courts is purely statutory; and the statute bestowing the authority defines the limits of its exercise. The statute confers no general equity jurisdiction." Courts of equity have no inherent jurisdiction to set aside wills on the ground of fraud, undue influence, or lack of testamentary capacity on the part of the testator. Jurisdiction of these questions is to be found solely in the statute on the subject.

The clerk in admitting a will to probate acts in a judicial capacity (*McCurdy* v. *Smith*, 107 Va. 757, 60 S. E. 78), and the order made by him admitting or rejecting the will is

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as much a judgment as though entered by a court. His judgment is a judgment *in rem* whose validity can be drawn in question only by appeal in the manner and within the time prescribed by law. It cannot be collaterally assailed. The judgment of the clerk entered in the instant case with reference to the paper offered as a will is that "the clerk doth admit the same to probate as and for the last will and testament of said Eliza W. Rudolph, deceased, and doth order the same to be recorded." The adjudication of the clerk that the paper is the true last will and testament of the testatrix was an adjudication not only that the will was duly executed, but of all other questions necessary to the validity of the testamentary act, and this adjudication could not be assailed except in the manner pointed out by the statute. If for any cause the appellants desired to contest that adjudication the statute gave them an appeal of right within one year. This appeal, if taken, would have transferred the case to the circuit court of the county, and the statute declares that when so transferred the court should hear and determine the matter as if it had been presented to said court in the first instance, that is to say, there would have been a trial *de novo*. Section 2542 provides how such trials shall be conducted. As hereinbefore pointed out, a court of equity has no inherent jurisdiction to try the question of undue influence or want of mental capacity, and the only statutory jurisdiction conferred on the court was that given by section 2544 of the Code. Under this section, where there has been an *ex parte* probate, in a court, any person interested who is not a party to the proceeding may, within two years, file a bill to impeach or establish the will. A bill praying for an issue *devisavit val non* cannot be filed where the will has been admitted to probate before the clerk and no appeal has been taken, nor can it be filed where the persons interested in the probate have been summoned and contested the validity of the will. This subject has been

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so fully and satisfactorily treated in the cases above cited that it is not deemed necessary to do more than to refer to them.

For these reasons, the decree of the circuit court is affirmed.

Affirmed.

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Wytheville.

STUART'S EXECUTORS V. THE BOARD OF SINKING FUND COMMISSIONERS.

June 13, 1918.

1. STATUTES—*Title—Waiver of Statute of Limitations.*—The title of the act of March 12, 1912 (Acts 1912, page 292, chapter 144), providing for the presentation to the board of sinking fund commissioners for funding of any bonds, coupons or other obligations on which it is claimed that the Commonwealth of Virginia is liable by reason of having guaranteed the payment of the principal sum or interest, is not defective, and insufficient because no reference therein was made to the waiver of the statute of limitations by the State contained in the body of the act.
2. CONSTITUTIONAL LAW—*Delegation of Power by Legislature.*—The legislature cannot delegate its power to make law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.
3. CONSTITUTIONAL LAW—*Delegation of Power by Legislature—Act of March 12, 1912.*—The act of March 12, 1912, providing for the presentation to the board of sinking fund commissioners for funding of any bonds, coupons or other obligations on which it is claimed that the Commonwealth of Virginia is liable by reason of having guaranteed the payment of the principal sum or interest, waived the statute of limitations, subject only to the existence of certain facts and circumstances peculiar to the cases that might arise, and the provisions of the statute in this respect are not unconstitutional, as the delegation of legislative and judicial functions to an administrative body, the board of sinking fund commissioners.
4. CONSTITUTIONAL LAW—*Refunding Bonds—Unused Bonds.*—The act of March 12, 1912 (Acts 1912, page 292), is not invalid because it proposes to fund the bonds in question by the use of

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a part of certain State bonds authorized by the act of February 20, 1892 (Acts 1891-2, page 533), for the settlement of the public debt of Virginia not funded under previous acts. The funding bonds thus provided for have not as yet been called for or used, and there is no reason why the State may not apply these unused assets to the present purpose.

Appeal from a decree of the Circuit Court of city of Richmond. Decree for defendants. Petitioners appeal.

Reversed.

The opinion states the case.

W. D. Cardwell, for the appellants.

J. D. Hank, Jr., Attorney-General, and *Leon M. Bazile, Assistant Attorney-General,* for the appellee.

KELLY, J., delivered the opinion of the court.

By an act of the General Assembly, approved March 12, 1912 (Acts 1912, p. 292), it was provided that if at any time within two years from that date "there should be presented to the board of sinking fund commissioners any bonds, coupons or other obligations on which it is claimed that the Commonwealth of Virginia is liable by reason of having guaranteed the payment of the principal sum or interest thereon, in whole or in part (section 3), and the board should refuse to fund the same in the manner thereinafter set out, then it should be lawful for the holders of such obligations to file a petition against the board in the Circuit Court of the city of Richmond, which court was given jurisdiction to try and determine the question of the Commonweath's liability.

The act prescribed the method of procedure, the general purport of the order to be entered for or against the petitioners, and, if for them, directed that the amount ascertained in their favor should "be fundable as old unfunded

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obligations under the act approved the 20th of February, 1892."

The provision of the act with which we are here chiefly concerned is as follows: "The proceedings shall be conducted in all respects as chancery causes are conducted, and in accordance with the principles, rules and regulations and methods of procedure, and the said board of sinking fund commissioners in said proceedings shall set up and insist upon all defenses, both legal and equitable, which the Commonwealth would be entitled to insist upon if the proceeding was directly against the Commonwealth: provided, however, that the said commissioners shall not interpose the technical plea of the statute of limitations either as to the principal or interest of said alleged obligations, unless in the judgment of said board of sinking fund commissioners it is proper and necessary to do so to protect the Commonwealth from the payment of an unjust and inequitable demand, for which the Commonwealth might otherwise be held liable; in which event said plea shall be interposed at any time before final decree, but this waiver of the technical plea of the statute of limitations shall not be held or construed as in any way interferring with, affecting, weakening or impairing in any manner whatsoever any other legal or equitable defense which may be interposed by the said board of sinking fund commissioners in defense of said proceeding. * * *"

Pursuant to this act, and within the time thereby prescribed, appellants presented to the sinking fund commissioners certain bonds and coupons alleged to have been guaranteed by the Commonwealth, and requested that the same be funded. The request was refused, and thereupon the appellants filed their petition in the circuit court.

The bonds in question, according to allegations of the petition admitted to be true by the demurrer now before us, were a very small part of a total of $300,000 of obligations

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of the Chesapeake and Ohio Canal Company guaranteed by the State of Virginia pursuant to authority and direction of an act of the General Assembly approved March 8, 1847 (Acts 1846-47, chapter 107), and "were purchased by and became the property of the said R. H. Stuart, your petitioners' testator, for valuable consideration, and have been held by the said R. H. Stuart and his estate and are still held by your petitioners."

The petition also contains the following allegation, which we must accept as true upon the demurrer: "The Commonwealth has further recognized its liability by accepting thirteen thousand dollars ($13,000.00) of the said bonds as cash in a settlement made between it and the United States Government in April, 1913, concerning certain claims held by the Commonwealth and the United States Government, respectively, against each other, and has further recognized its liability upon said bonds in the suit of *Virginia* v. *West Virginia*, pending in the Supreme Court of the United States, by not only admitting its liability but insisting that, as the Commonwealth of Virginia was obliged to pay said bonds, West Virginia should bear her proportion of the same."

To this petition the sinking fund commissioners demurred, on the ground, (1) that the act was unconstitutional, and (2) that the guarantee of the Commonwealth upon the particular obligations involved was not absolute, but conditional, and that the petition failed to allege performance of the conditions.

The circuit court sustained the demurrer and dismissed the petition on the constitutional questions raised thereby, and did not pass upon the second proposition. The appellants do not waive the latter in this court, but do not argue it in their brief or cite any authorities in its support. In our opinion, the proposition is not tenable.

The real controversy, in the present status of the case, is

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whether the act is constitutional. To sustain its position in this respect, the Commonwealth assigned a number of reasons upon which the court below was asked, and upon which we are now asked, to declare the enactment invalid. Upon a careful consideration, we are of opinion that no sufficient reason has been presented for holding the act unconstitutional, and it does not seem necessary to enter into any protracted discussion of the question.

The order of the court sustaining the demurrer does not indicate the grounds upon which the act was held unconstitutional. In the petition for appeal it is alleged that these grounds, as "stated orally from the bench, were, principally, first, that the title of the act was defective and insufficient because no reference therein was made to waiver of the statute of limitations, and, second, because the act was a special act and sought to delegate to a board the right and duty of determining whether the statute of limitations should be pleaded in the case or not."

The principles involved in the first of these grounds have received frequent and recent consideration from this court, and we deem it sufficient to say that, in our opinion, the act cannot be successfully assailed on account of any infirmity in the title.

The constitutional questions which appear to be most seriously relied upon call the act in question on the ground that it delegates to an administrative body, the board of sinking fund commissioners, legislative and judicial functions. The contention is that it was not competent for the legislature to leave it to the board to determine in given cases the justice and equity of the demands asserted under the statute, but should either have determined that question for itself or have left it to the court upon which the jurisdiction to hear and determine the cause was conferred. In our view of the statute, however, the legislature has in terms waived the statute of limitations, subject only to the exist-

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ence of certain facts and circumstances peculiar to the cases that might arise, and the provisions of the statute in this respect seem to us practical, just and lawful. The case appears to fall within the reasoning of the opinion in *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716, in which the Supreme Court of Pennsylvania uses the following language: "The legislature cannot delegate its power to make law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The argument of the appellees that the act is not valid because it proposes to fund the bonds in question by the use of a part of certain State bonds authorized by the act of February 20, 1892 (Acts 1891-2, page 533), for the settlement of the public debt of Virginia not funded under previous acts, possesses no real merit. It is conceded that the funding bonds thus provided for have not as yet been called for or used, and we can see no reason why the State may not apply these unused assets to the present purpose. The period within which the funding boards provided for in the act of 1892 were to be available for the purpose therein specified has long since expired. Unwilling to avail itself of the limitation, the Commonwealth has repeatedly extended the time, and as a result the funding provisions of the act of 1892 are still open to the holders of any of the old unfunded obligations embraced therein. It would seem highly probable that unless there are further extensions of time made by the General Assembly, a large amount of these old funding bonds will not be required for the purposes specified in the original act. Further extensions will

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doubtless be made, but we think the General Assembly may be depended upon to enact any further legislation which may be necessary to meet the situation, if the claims asserted in the petition herein shall be ordered funded in the further proceedings to be had herein.

We are of opinion that the act is constitutional, and that the court erred in holding to the contrary.

It is perhaps pertinent to observe that the portion of the said act of March 12, 1912, which provided for the adjudication and funding of the obligations involved in this case, has been repealed, and had been repealed at the time when the court passed upon the demurrer. The only point made in the argument and briefs before us with regard to this repeal was the manifestly correct assertion, that it answers the contention of the Commonwealth concerning the far-reaching consequences of the decision in this case as to the amount of claims that might be presented and ordered funded as against the Commonwealth. The claims here involved, amounting to about $8,000, are the only ones which can possibly be validated under the act. We will express no opinion as to what effect, if any, the repeal of the act may have upon the further proceedings in this cause. This question not having been raised before us, we deem it best to content ourselves by an order upholding the constitutionality of the act, overruling the demurrer upon this ground, and remanding the cause to the lower court for further proceedings. In such proceedings the commissioners, regardless of any question as to the effect of the repeal of the act upon the rights of the parties herein, will of course still have the right and power to plead the statute of limitation if they regard the demands of the petitioners as being unjust or inequitable.

Reversed.

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Syllabus.

Wytheville.

STUART, GOVERNOR, ETC., AND OTHERS v. SMITH-COURTNEY COMPANY.

June 13, 1918.

1. STATE—*Action Against—Under Section 746 of the Code of 1904.*—Proceedings based upon contracts will lie against the State and its agencies under section 746 of the Code of 1904. Sections 747, 748 and 749, immediately following, provide for the procedure, while section 750 limits the effect of judgments or decrees which may be rendered against the Commonwealth in such proceedings.
2. STATE—*Action Against—Unaer Section 746 of the Code of 1904—Construction of Statute.*—The statute (sections 746, 750, Code of 1904) providing for relief against the State by proceedings based upon contract, will be liberally construed.
3. STATE—*Action Against—Under Section 746 of the Code of 1904—Construction of Statute.*—The Commonwealth will not be astute to escape inquiry into its liability for its alleged contracts, or to take advantage of technical defenses which are permissible to other litigants.
4. INSTRUCTIONS—*Based Upon the Evidence.*—While it is error to give instructions when there is no evidence tending to prove the facts upon which the instructions are based, the Supreme Court of Appeals cannot pronounce instructions erroneous merely if of the opinion that the suggestions of fact therein are against the weight of the evidence. To the jury is confided the responsibility of determining the weight of the testimony, and if there is evidence introduced upon which the instructions may be based the giving of the instructions by the lower court is not error.
5. WITNESSES—*Documentary Evidence—Refreshing Memory.*—Where a witness. who had made certain written reports was upon the witness stand with the reports in his hand. refreshed his memory from time to time therefrom, and might have testified, and indeed did testify. as to every fact therein contained which was deemed pertinent by either of the parties, it was not error to exclude the reports themselves.
6. APPEAL AND ERROR—*Harmless Error—Exclusion of Evidence.*—

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Where a witness who has made certain official reports testified as to all pertinent or material facts contained in the reports, if there was any error in refusing to admit the reports, which could only be upon the theory that they had some additional sanction because they were alleged to be official reports, the error was clearly harmless.

7. APPEAL AND ERROR—*Conflicting Evidence.*—Where issues are fairly submitted to a jury upon conflicting evidence, the verdict of the jury, sanctioned by the trial court, is generally accepted as conclusive.

8. NEW TRIAL—*Verdict Contrary as to the Law and Evidence—Conflicting Evidence—Issue out of Chancery.*—Even in an issue out of chancery, the finding of a jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it.

9. CONSTITUTIONAL LAW—*Judiciary Interfering with Executive Functions.*—In trying a case brought by a contractor, claiming a balance due for the construction of a lime grinding plant under a contract with the Convict Lime Board, the Circuit Court of the city of Richmond was not substituting its discretion and that of the jury for the discretion of the Convict Lime Board, but was merely ascertaining in the method prescribed by statute whether or not, under the contract, there was any debt fairly due by the Commonwealth to the plaintiff. The board had the discretion to discard the machinery and to substitute other machinery therefor.

10. STATE—*Pecuniary Obligation Founded on Contract—Enforcement of Judgment.*—While the exercise of governmental discretion can never be controlled or directed by the courts, if it is alleged that out of the exercise of such discretion there arises a pecuniary obligation of this Commonwealth, based upon a contract, the Circuit Court of the city of Richmond is open for the determination of that issue. Such proceedings, however, if they result in a judgment, simply establish the demand. No execution can be levied thereunder to subject either the property of the State, its governmental agencies, or that of persons constituting such governmental agency. A special appropriation is necessary before the payment of such demand.

11. REMITTITUR.—Where a contractor filed its petition in the Circuit Court of the city of Richmond against the members of the Convict Lime Board, under a contract with the board, claiming a balance due for the construction of a lime grinding plant, the reduction by the trial court of the verdict of the jury for the plaintiff, because certain charges, chiefly for repairs, which were made during the time the plaintiff was making efforts to correct deficiencies in the plant, had been included therein was proper.

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Opinion.

Error to a judgment of the Circuit Court of the city of Richmond, upon a petition against the members of the Convict Lime Board, the Auditor of Public Accounts and the Treasurer. Judgment for plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

Jno. R. Saunders, Attorney-General, J. D. Hank, Jr., Assistant Attorney-General, Leon M. Bazile and *Robt. E. Scott,* for the plaintiffs in error.

Christian, Gordon & Christian, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The Smith-Courtney Company, hereinafter called the plaintiff, claiming a balance due for the construction of a lime grinding plant at Staunton, under a contract with the Convict Lime Board (composed of the Governor, the Superintendent of the Penitentiary and the Commissioner of Agriculture), filed its petition in the Circuit Court of the city of Richmond against the members of the board, the Auditor of Public Accounts and the Treasurer, hereinafter called the defendants, under section 746 of the Code, and the court empaneled a jury, under section 748, which found a verdict for the plaintiff, of which the defendants are here complaining.

1. The first error alleged is the refusal of the court to sustain a demurrer to the petition. The grounds of this demurrer are stated in this language:

"That this is a suit against the State government, or a board created by the State for governmental purposes, and cannot be maintained without the consent of the State, and that the statute which created the State Lime Grinding

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Board does not authorize it to sue or be sued, and that there is no other statute which authorizes a suit to be maintained against the State Lime Grinding Board."

It is agreed that the board was created by the State for governmental purposes (*Shenandoah Lime Co.* v. *Mann, Governor of Virginia*, 115 Va. 865, 80 S. E. 753, Ann. Cas. 1915 C, 973), and that, therefore, this proceeding is in effect a suit against the State which cannot be maintained without the consent of the State. The plaintiff, however, relies upon section 746 of the Code as expressly giving such consent.

That statute reads as follows: "When the Auditor of Public Accounts shall disallow, either in whole or in part any such claim against the Commonwealth as is provided for by section seven hundred and sixty-five, the person presenting such claim may petition the Circuit Court of the city of Richmond for redress. And where a person has any other claim against the Commonwealth, redress may be obtained in the said court, by a petition or by a bill in chancery, according to the nature of the case."

The question is not a new one in this State, and it may be regarded as settled that proceedings based upon contracts will lie against the State and its agencies by authority of this statute. Sections 747, 748 and 749, immediately following, provide for the procedure, while section 750 limits the effect of judgments or decrees which may be rendered against the Commonwealth in such proceedings. *Dunnington* v. *Northwestern Turnpike*, 6 Gratt. (47 Va.) 160; *Higginbotham's Executrix* v. *Commonwealth*, 25 Gratt. (66 Va.) 637; *Eastern Lunatic Asylum* v. *Garrett*, 27 Gratt. (68 Va.) 163; *Parsons* v. *Commonwealth*, 80 Va. 167. It is also true that the statute does not authorize actions against the State or its governmental agencies based upon torts. *Sayre* v. *Northwestern Turnpike*, 10 Leigh (37 Va.) 454; *Maia's Adm'r* v. *Eastern State Hospital*, 97 Va. 507, 34 S. E. 617, 47 L. R. A. 577. Nor can suits to establish mechanics' liens

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against public property be maintained. *Phillips* v. *University of Va.*, 97 Va. 472, 34 S. E. 66, 47 L. R. A. 284. That the statute will be liberally construed is also indicated in *Green* v. *Marye, Auditor*, 112 Va. 352, 71 S. E. 555, where, in the view which the court took of that case, it is said: "It is immaterial whether the proceeding is to be regarded as one at law or in equity; or whether the evidence has been incorporated into the record by a proper bill of exceptions or not; or whether the alleged agency of petitioners' intestates was joint or several; or whether the alleged contract upon which this action is brought should be construed to be a contract for procuring legislation, and, therefore, void as *contra bonos mores.*"

The demurrer then was properly overruled, for the Commonwealth will not be astute to escape inquiry into its liability for its alleged contracts, or to take advantage of technical defenses which are permissible to other litigants.

2. The next assignment of error is that the court erred in giving for the plaintiff these instructions:

III. "The court instructs the jury that if they believe that the plaintiff company furnished the defendant Lime Grinding Board with machines which were capable of performing the work as specified in the contract and under the conditions as called for in the contract, and that there was a failure on the part of the purchasers of said machines to operate the said machines in an intelligent and efficient way, and to supply competent and intelligent supervision, and that the failure to secure capacity, and the breakages, if any, in said machines were directly attributable to the unintelligent and inefficient operation of said plant, and to no inherent and incurable vice in said machines, then the jury is instructed that they shall find for the plaintiff; provided you shall believe from the evidence that the plaintiff, in all other respects, complied with the terms of its contract."

I. "If the jury believe from the evidence that the

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machines, when operated by the plaintiffs, did produce the capacity required by the contract, and that such machines, when operated by the defendants, would have produced the required capacity had they been operated under proper management, then they shall find for the plaintiffs; provided you shall believe from the evidence that the plaintiff, in all other respects, complied with the terms of its contract."

This objection is based upon the rule that it is error to give instructions when there is no evidence tending to prove the facts upon which the instruction is based.

This proposition of law is established, but we cannot agree that there is no evidence upon which to base these instructions. While it may fall far short of convincing us that there was any failure on the part of the defendants or their agents to operate the machinery properly or to supply competent and intelligent supervision, or that there was the slightest improper management; still those are not questions for us to determine. We cannot under our system pronounce instructions erroneous merely if of the opinion that the suggestions of fact therein are against the weight of the evidence. To the jury is confided the responsibility of determining the weight of the testimony, and there is no doubt whatever that there was evidence introduced by the plaintiff sufficient to justify the giving of these instructions, and especially that tending to indicate the inexperience of the superintendent of the plant. We think, therefore, that the court committed no error in this respect.

Under this assignment the defendants' counsel also suggest that the instruction "III," "is framed on the theory that the plaintiff contracted to furnish certain machinery, while in fact the contract was to build and equip a plant capable of certain results." While this is undoubtedly true, nevertheless it is likewise true that the controversy very largely grew out of the deficiency of certain parts of the

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machinery which were clearly specified, and which were afterwards removed from the plant and replaced with certain other machinery more satisfactory to the board.

3. Another assignment of error is the refusal of the court to permit the introduction of certain written reports made by the superintendent of the plant to the board.

While there might be circumstances under which it would be error to refuse to admit such reports, still it is not true under the circumstances of this case, because Vines, the superintendent, who made the reports was upon the witness stand with the reports in his hand, and refreshed his memory from time to time therefrom, and might have testified as to every fact therein contained. Indeed, as a matter of fact, he did testify to all of the facts therein contained which were deemed pertinent by either of the parties.

An examination of these reports, however, which are embodied in one of the bills of exceptions, does not show that there was any pertinent or material fact therein to which the witness did not testify. They support the defendants' view and show, in the main, the inefficiency of the alleged defective machinery, but certain excerpts can be made from them which indicate that occasionally the machinery operated properly, and sometimes there was no criticism of the results accomplished. If, therefore, there was any error in refusing to admit the reports, which could only be upon the theory that they had some additional sanction because they were alleged to be official reports, the error was clearly harmless.

4. The fourth assignment of error is to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

We do not think it is necessary to enter into any discussion of the evidence. It is sufficient to say that, according to the testimony of the defendants, the plant was deficient; that the plaintiff failed to perform its contract; that there

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was no reason to suppose that by any further extension of time the machinery could be so added to or repaired as to make it efficient; that the farmers of the State were demanding ground limestone, and, as there had already been great and unanticipated delay, that they had a right to expect it; and that in the performance of their public duty and in the exercise of their discretion, it was necessary to discard the defective machinery and to substitute other and better machinery therefor; while, on the other hand, according to the testimony of the plaintiff, it was greatly handicapped by the fact that it expected the machinery to grind what was denominated in the contract as a "good grade of clean limestone," according to their view of the ordinary meaning of those words, whereas it turned out that instead of the limestone being of that character—that is, limestone containing 95 to 98 per cent. of calcium carbonate—it in fact contained only 66 per cent. of calcium carbonate and 28 per cent. magnesium carbonate, making it a very much harder substance and much more difficult to grind; that if further time had been given it would have brought the plant up to its proper efficiency; that the superintendent did not operate it with proper care; that the deficiencies arose from causes beyond its control; and that if a reasonable time had been allowed by the defendants all of these defects would have been corrected. The record shows that the conflict of opinion was more acute than the conflict of evidence. These issues were fairly submitted to a jury, and, in accordance with precedents where such conflicts arise, the verdict of the jury, sanctioned by the trial court, is generally accepted as conclusive.

It is urged that we should not consider this verdict as upon a demurrer to the evidence under section 3484 of the Code. This, in our view, is immaterial, for even in an issue out of chancery, the finding of a jury will not be disturbed unless it is palpably and obviously erroneous, or is without

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evidence to support it. *Barbour* v. *Melendy & Russell*, 88 Va. 598, 14 S. E. 326; *N. & W. Ry. Co.* v. *Allen & Sons*, 122 Va. 603, 95 S. E. 406.

In trying the case the court was not substituting its discretion and that of the jury for the discretion of the Convict Lime Board, but was merely ascertaining in the method prescribed by statute whether or not, under the contract, there was any debt fairly due by the Commonwealth to the plaintiff. The board had the discretion to discard the machinery and to substitute other machinery therefor, but, as is said by Judge Bouldin in *Higginbotham's Executrix* v. *Commonwealth, supra:* "It has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself, and there never has been a moment since October, 1778, (but two years and three months after she became an independent State) that all persons have not enjoyed this right by express statute." So that while the exercise of governmental discretion can never be controlled or directed by the courts, if it is alleged that out of the exercise of such discretion there arises a pecuniary obligation of this Commonwealth, based upon a contract, the Circuit Court of the city of Richmond is open for the determination of that issue. Such proceedings, however, if they result in a judgment, simply establish the demand. No execution can be levied thereunder to subject either the property of the State, its governmental agencies, or that of persons constituting such governmental agency. Burks' Pl. & Pr., 629. By section 750 it is expressly provided that no judgment or decree against the Commonwealth, unless otherwise expressly provided, shall be paid without a special appropriation therefor by law, and section 186 of the Constitution prohibits any payments out of the State treasury except in pursuance of appropriations made by law. Fortunately for the plaintiff, the General Assembly at its last session, alert to continue the ancient

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policy of the State, and "in order to avoid injury to all parties" (as stated in the act), by the act entitled "An act for the relief of the Smith-Courtney Company," approved February 5, 1918, (Acts, 1918, p. 21), has made an appropriation for the payment of this judgment if it shall be finally determined to be valid.

The trial court reduced the verdict of the jury, because certain charges, chiefly for repairs which were made during the time the plaintiff was making efforts to correct the deficiencies, had been included therein, and this is assigned as error by the plaintiff. We think that this reduction was clearly proper.

Judgment affirmed.

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Syllabus.

Wytheville.

L. J. UPTON AND COMPANY, INCORPORATED v. REEVE.

June 13, 1918.

Absent, Burks, J.

1. SALES—*Breach of Contract by Seller—Condition of Subject at Place of Shipment and at Place of Destination—Case at Bar.*—Plaintiff sold to defendant 600 bushels of onion sets "f. o. b. Chicago." The sets were to be shipped to defendant at Norfolk, the "sets to be in good merchantable condition at time of shipment, to be screened through 7/8-inch mesh sieve." In an action by the seller against the buyer for the purchase price of the onion sets, where defendant alleged that the plaintiff did not perform the contract on his part in that he did not deliver the onion sets in accordance with the contract of sale, the condition of the onion sets at Chicago at the time of their shipment was in issue in the case, and not their condition at Norfolk, save in so far as the latter was proper evidence of their prior condition at Chicago.
2. SALES—*Breach of Contract by Seller—Evidence—Case at Bar.*—In the case at bar, taking the most favorable view of the evidence for defendant, such evidence left it equally probable that the condition of the onion sets upon their arrival in Norfolk might have been due to the negligence of the transportation company or the natural tendency to decay, due to the onion sets having been grown in a wet season, and not to their not having been in the condition the contract stipulated that they should be at the time of shipment. For the last named default only could the seller be held responsible. He did not warrant the keeping quality of the onion sets, or that they would germinate, nor was he responsible for any injury resulting from negligence of the carrier.
3. SALES—*Action by Seller for Price—Defective Condition of Subject of Sale.*—Where the evidence left it equally probable that the defective condition of the subject of sale complained of by the buyer was as likely due to other causes for which the seller was not responsible, as to a cause for which he was responsible, there was no evidence to support a verdict of the jury in favor of the buyer.

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4. SALES—*Action by Seller for Price—Defective Condition of Subject of Sale—Case at Bar.*—There was evidence in the very condition of the onion sets on arrival at Norfolk, in the matters of size and the quantity of dirt and trash in them, tending to show that they had not been "screened through (a) 7/8-inch mesh sieve" before shipment from Chicago, and, hence as to the non-screening of the onion sets through such a sieve, there was evidence sufficient to go to the jury to be weighed and considered by them along with all the other evidence in the case on the question of whether the onion sets had been screened before shipment as the contract required. An instruction, therefore, which withdrew the evidence of such condition of the onion sets from the consideration of the jury, was erroneous and prejudicial to the defendant.
5. SALES—*Hypothetical Question—Sufficiency—Case at Bar.*—Counsel for defendant asked a witness the following question: "If a car of yellow onion sets was properly packed in a refrigerated car in Chicago on the 13th day of January, 1916, and arrived here on the 24th day of January, 1916, in the same car in which they were packed, which car was a refrigerated car, and at the time of its arrival the car was cool and in proper condition, ought those onion sets to have been in the same condition as they were at the time they were shipped in Chicago?" Counsel for plaintiff objected to the question on the ground that it was a hypothetical question based upon a partial statements of the facts. The court sustained this objection. It appeared that an affirmative answer would have been given to the question.
Held: That the question was fatally defective in that it failed to include a statement of the maintenance of a proper condition of refrigeration and ventilation of the car containing the shipment while it was in transit from Chicago to Norfolk. Therefore, there was no error in the action of the court below in declining to allow an answer to be given to the question.

Error to a judgment of the Court of Law and Chancery of city of Norfolk, in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Reversed.

This is an action of assumpsit by the defendant in error, who was plaintiff in the court below (hereinafter designated as plaintiff), against the plaintiff in error (hereinafter

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designated as defendant) for $675, the purchase price of 600 bushels of yellow onion sets sold by plaintiff to defendant.

The onion sets were sold "f. o. b. Chicago," which was the point of origin of the shipment, and were to be shipped to the defendant at Norfolk, Va. The other material provisions of the contract of sale were the following: "Sets to be in good merchantable condition at time of shipment, to be screened through 7/8-inch mesh sieve."

The defendant filed two special pleas which averred, in substance, that the plaintiff did not perform said contract on his part, in this, that he did not deliver the onion sets in accordance with the contract of sale, and set up by way of set-off a claim against the plaintiff for $1500 damages because of such alleged breach of contract.

There was a trial by jury, a verdict and judgment in favor of the plaintiff for the $675, the whole amount of the plaintiff's claim, and the defendant brings error.

THE MATERIAL EVIDENCE.

There was direct evidence on behalf of the plaintiff that the onion sets when delivered on board car in Chicago had been "screened through 7/8-inch mesh sieve," and were "in good merchantable condition;" that they were loaded in a refrigerator car, which, although not stipulated for in its contract of sale, was, so far as appears in evidence, the usual and a proper car for such shipment. And there was testimony of plaintiff's witnesses tending to show that the onion sets, having been grown during an unusually long wet season, were not of good keeping quality, although such testimony was itself in conflict as to whether this lack of keeping quality at gathering time had any bad effect on the shipment to defendant.

The evidence on behalf of the defendant concerned the

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condition of the onion sets when they arrived at Norfolk. This evidence tended to show that the onion sets on arrival at Norfolk were not in the condition called for in the contract of sale in two particulars: (1) That they were not "in good merchantable condition," in that they were "half rotten"—"they were like a broom-straw, and there was no life or tissue in them at all;" that when planted they would not germinate; (2) that "a good many" of them "were over an inch" in size and had a large amount of dirt and trash in them, indicating that they had not been "screened through (a) 7/8-inch mesh sieve" before shipment.

There was no evidence for the defendant, however, either as furnished by its own witnesses or by the evidence for the plaintiff, sufficient to show "substantially *all* the conditions surrounding the shipment during the time it was in possession of the transportation company." It did appear, however, from the testimony for the plaintiff that the shipment was made in a refrigerator car as aforesaid; that shipment was made at Chicago on the 13th of January, 1916; that according to the usual time such a shipment would take it should have arrived at Norfolk in four days. It appeared from the bill of lading in evidence that the railroad company undertook to transport the shipment from Chicago to Norfolk in the refrigerator car aforesaid with "vents closed to 300 temperature;" that the shipment was "perishable;" that there was to be "no delay;" and that it was to "allow ventilation." And there was evidence that the defendant at one time made a demand on the carrier for damages for the injury to said shipment, which the latter declined to pay. And there was direct testimony for defendant that when the car arrived in Norfolk it was "cool and in proper condition;" that it arrived in Norfolk on January 24th, being seven days delayed in transit according to evidence for plaintiff; and there was evidence for defendant tending to show that if the said car was properly refrigerated at

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the time of the shipment at Chicago and had been kept so in transit between Chicago and Norfolk the onion sets would have been in the same condition when they arrived at Norfolk as they were when loaded on board the car at Chicago. There was no evidence, however, that the car was properly refrigerated when the shipment began, or that it was kept so in transit.

In this condition of the evidence, the trial court gave the following instruction to the jury:

"No. 2. The court further instructs the jury that the evidence in respect to the condition of the onion sets upon their arrival in Norfolk, or on their delivery at Drivers, cannot be considered by the jury except as tending to show their condition when delivered at Chicago, and said evidence cannot tend to show such condition unless substantially all the conditions surrounding the shipment during the time it was in the possession of the transportation company appear from the testimony."

The giving of this instruction is assigned by the defendant as error.

On the trial a Mr. Moreland was introduced by the defendant as an expert witness, and the following questions and answers, and a portion of what occurred between counsel and the court, illustrating the matter in issue, will best appear from the following excerpts from the record:

"Q. If onion sets are shipped in January, and two weeks in transit in a refrigerated car, would they deteriorate?

"A. They ought not to.

"Mr. Baird: I object to that. It takes for granted the whole question that they were in a refrigerated car.

"Mr. Hicks: It is admitted that they were.

"The Court: It is admitted that they were in a refrigerated car, but there is no proof that there was any ice, and that it came all the way from Chicago properly refrigerated.

"Mr. Hicks: It is proved by Mr. Whitehead it was cool.

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"The Court: That does not show that it was properly refrigerated all the way.

"Mr. Hicks: I think the presumption is that it was properly refrigerated. I could not prove that it was constantly refrigerated.

"The Court: Yes, you could, by the railroad company. It is constantly done.

"Mr. Hicks: Does your honor rule the question out?

"The Court: Yes.

"Mr. Hicks: I except.

* * * * * * *

"Mr. Hicks: I asked if they were properly loaded what would affect them coming here.

"The Court: Unless you can show how they came here—

* * * * * * *

"Mr. Hicks: Mr. Reeve said that they were shipped in a refrigerated car, and in the same car and same number that they arrived in. Now, does your honor rule that I can't ask if they were properly shipped in a refrigerated car, and properly packed in Chicago, and arrived here in the same car, whether they should be in good condition here on arrival?

"The Court: Not exactly that.

"Mr. Hicks: Does your honor say I have to prove every hour—

"Mr. Baird: Let him ask the question, and let us object each time.

"By Mr. Hicks:

"Q. If a car of yellow onion sets was properly packed in a refrigerated car in Chicago on the 13th day of January, 1916, and arrived here on the 24th day of January, 1916, in the same car in which they were packed, which car was a refrigerated car, and at the time of its arrival the car was cool and in proper condition, ought those onion sets to have

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been in the same condition as they were at the time they were shipped in Chicago?

"Mr. Baird: I object upon the ground, first, that it is a hypothetical question based upon a partial statement of the facts and the evidence in this case shows conclusively that the defendant here alleged that the trouble was with the railroad and made demand on the railroad.

"The Court: I don't think that is proper on that statement. Note an exception.

"Mr. Hicks: I note an exception."

The second and sole remaining assignment of error by the defendant is to the action of the court below in refusing to allow the question last above quoted to be answered.

R. R. Hicks and *John Upton,* for the plaintiff in error.

Baird & Swink, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

No authorities are cited either for plaintiff or defendant.

1. Of course, the condition of the onion sets at Chicago at the time of their shipment was in issue in the case before us, and not their condition at Norfolk, save in so far as the latter was proper evidence of their prior condition at Chicago. Further:

It will be observed, from a consideration of the statement preceding this opinion, that the evidence in the case bears upon two aspects of the condition of the onion sets on their arrival at Norfolk, (1) one aspect having reference to their rotten and rotting condition, and the failure of the onion sets to germinate, which may or may not have been brought about by improper refrigeration or lack of refrigeration of the car containing the shipment in transit, or by the delay in transit, or by the condition in which the onion sets were

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at the time of shipment, although measuring up to the contract specifications; and (2) the other aspect having reference to more permanent features of and circumstances with respect to the condition of the onion sets, which, if present when they arrived at Norfolk, indicated, in the nature of things, in accordance with natural laws, that the same condition existed when the onion sets were put on board the car at Chicago; as for example, the size of the onions and the amount of dirt and trash with them, tending to show that they had never been passed through a 7/8-inch mesh sieve.

With respect to the first aspect of the evidence: If we take the most favorable view of it for defendant, such evidence leaves it equally probable that such condition may have been due to the negligence of the transportation company or the natural tendency to decay, due to the onion sets having been grown in a wet season, and not to their not having been in the condition the contract stipulated that they should be at the time of shipment. For the last named default only could the plaintiff be held responsible. He did not warrant the keeping quality of the onion sets, or that they would germinate, nor was he responsible for any injury resulting from negligence of the carrier. Since the evidence left it equally probable that the defective condition complained of by defendant was as likely due to other causes for which the plaintiff was not responsible, as to a cause for which he was responsible, under a well established rule of law, there was no evidence to support a verdict of the jury in favor of the defendant on the first aspect of it, which we have under review. To that extent the intruction complained of was correct.

With respect to the second aspect of the evidence: There was evidence in the very condition of the onion sets on arrival at Norfolk, in the matters of size and the quantity of dirt and trash in them, tending to show that they had not

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been "screened through (a) 7/8-inch mesh sieve" before shipment from Chicago, and, hence as to the non-screaming of the onion sets through such a sieve as there was evidence sufficient to go to the jury to be weighed and considered by them along with all the other evidence in the case on the question of whether the onion sets had been screened before shipment as the contract required. The instruction complained of withdrew the evidence of such condition of the onion sets from the consideration of the jury, and to that extent the instruction was erroneous. And since the instruction went to that extent upon such a vital point of the issue made by the pleadings of the defendant, it appears from the record to have been prejudicial to the defendant, and, hence, the giving of it was reversible error.

2. On the subject of the refusal of the trial court to allow an answer to be given to the hypothetical question set forth in the statement above, preceding this opinion: This is the sole remaining assignment of error for our consideration.

That an affirmative answer would have been given to this question appears from the aforesaid statement.

The question, however, was fatally defective in that it embraced both aspects of the evidence above adverted to and yet failed to include a statement of the maintenance of a proper condition of refrigeration and ventilation of the car containing the shipment while it was in transit from Chicago to Norfolk. Therefore, there was no error in the action of the court below in declining to allow an answer to be given to the question.

However, because of the error in giving the instruction aforesaid, we are of opinion to reverse the judgment complained of and grant to the defendant a new trial, which will be accordingly done, to be had not in conflict with the views expressed in this opinion.

Reversed.

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Wytheville.

VIRGINIA RAILWAY AND POWER COMPANY v. BAILEY.

June 13, 1918.

Absent, Burks, J.

1. APPEAL AND ERROR—*Evidence Construed as Upon Demurrer to Evidence—Natural Laws.*—The statutory rule (section 3484, Code of 1904), under which the Supreme Court of Appeals must consider the evidence when certified, cannot compel that court to accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated.
2. APPEAL AND ERROR—*New Trial—Carriers of Passengers—Injury to Passenger—Street Railways—Natural Laws.*—In an action against a street railway company to recover damages for injuries to a passenger alleged to have been caused by the starting of the car while the plaintiff was in the act of alighting therefrom, the case turned upon the question of whether the testimony of the plaintiff was of sufficient probative value to support the verdict of the jury in finding that the car was again started after it stopped, and thus threw the plaintiff therefrom as she was in the act of alighting. It was not alleged that the plaintiff was thrown from the car by any act of negligence of the defendant in stopping the car. The plaintiff's testimony was fatally inconsistent with itself and with natural laws in its statement that she was thrown from the car by its starting forward after it had stopped, and yet that she was thrown "kind of forward." The physical fact is, in the absence of explanation not furnished by the evidence, that it was physically impossible for the plaintiff to have been thrown *forward* from the car by its *forward* jerk or movement. By such a movement of the car—by its starting after it had stopped—she would, in her position, so far as shown by her own testimony, have been thrown *backward* instead of "kind of forward." And the stopping of the car, as the plaintiff stepped down on the running-board (to use the plaintiff's language) "the second the car stopped, just at the time it stopped * * * and as I (she) was in the act of taking this left foot down * * *" would, according to natural laws, have jerked and thrown her "kind of forward"—as she in fact fell, as she testified.

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Held: That the plaintiff's own testimony, therefore, when considered in the light of the known operation of natural laws, shows that she was thrown by the stopping and not by the starting of the car.

3. CARRIERS OF PASSENGERS—*Street Railways—Duty to Give Reasonable Time for Passenger to Alight.*—If a passenger is thrown from a car and injured while in the act of alighting by the starting of the car after it has stopped, the carrier is liable for the injuries sustained by the passenger, whether the movement of the car in starting is violent or not is immaterial. It being unexpected is sufficient to charge the carrier, it being its duty to give reasonable time for the passenger to alight after having stopped the car.

Error to a judgment of the Hustings Court, Part II, of city of Richmond, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

This is an action of trespass on the case by the defendant in error, plaintiff in the court below (hereinafter designated plaintiff), against the plaintiff in error (hereinafter designated defendant) for damages for injuries occasioned the plaintiff by a fall in alighting from a street car, badly spraining an ankle, etc.

There was a trial by jury; a verdict and judgment in accordance therewith in favor of the plaintiff, and the defendant brings error.

THE MATERIAL FACTS.

There is no conflict in the evidence as to the following material facts in the case, namely: On signal of the plaintiff for the car to stop, it was brought to a stop at a usual stopping place with the front of the car about on line with the near building and inner sidewalk line of a street intersecting with the street on which the car was moving. The car contained the plaintiff and four other passengers, and also the motorman and conductor of the car. The plaintiff

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testified as the only witness in her own behalf. The conductor, motorman and three of the other four passengers testified as witnesses in behalf of the defendant. The failure of either side to call the fourth passenger as a witness is not accounted for. The car aforesaid was an open, summer car, going south, about twenty feet in length, of the usual construction, with handhole upon the upright standards at the ends of the seats above the running-board, and a running-board on the side for use of passengers in alighting or boarding the car. The plaintiff, just preceding the accident, was seated about midway of the car. After the plaintiff had given the stop signal, when the car was about midway of the block on which the stop was made, she slided on her seat out to the west end of it, on her right hand side as she faced the way the car was moving, and, before the car stopped, she arose, and with her left hand upon the handhold at that end of her seat, and with her gloves in her right hand, prepared to alight from the car as it approached the usual stopping place near by. She was thrown from the car to the pavement, not while she was stepping from the running-board to the pavement, but while she was in the act of stepping from the platform of the car, where she had arisen from her seat, to the running-board of the car. She was thrown from the running-board at the moment she placed her right foot upon it and was in the act of taking her left foot down upon it. After the plaintiff fell upon the pavement the car moved about ten feet. She was thrown from the running-board of the car either by a starting of the car after it had stopped, or by its stopping while she was in the act of stepping upon the running-board aforesaid. In either case there is no evidence that such movement or cessation of movement of the car was violent or constituted any negligence on the part of the defendant, so far as the character of that movement is concerned. The time of such movement or

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cessation of movement, in relation to the stop, whether after the stop or as constituting the stop, is the pivotal fact in issue. Upon this narrow but vital point it is claimed by the plaintiff that the evidence is conflicting.

THE CONFLICT IN THE TESTIMONY.

The plaintiff, on the point in question, testified on her examination in chief, as follows:

"Q. Please tell the jury what happened before and at the time of your accident, how it happened, in your own way?

"A. Well, I boarded the car at 2:35, and I gave the signal after leaving Hanover avenue, signaled with my left hand. I slid myself over to this side of the car (indicating). I stood up before the car stopped. The second the car stopped, just the time it stopped, I stepped down, and, as I was in the act of taking this left foot down, the car jerked, throwing me.

"Q. Before you stepped down the car then had stopped and was standing still?

"A. It stopped.

"Q. Did you take hold of any part of the car?

"A. Yes, I took hold of the handle of the car, I guess you might call it, with my left hand.

"Q. You took hold of that before you stepped down?

"A. Yes, sir.

"Q. At the time the car started, then, as you recollect it, the car started forward, and you had your right foot—

"A. I stepped down with my right foot.

"Q. On the running board?

"A. Yes, sir.

"Q. Your left foot up?

"A. Yes, sir.

"Q. Did you have anything in your hands?

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"A. I had one pair of gloves in my right hand.

"Q. How were you thrown?

"A. Well, *when the car jerked, I was thrown* this way (indicating), *kind of forward,* and it took my feet from under me, and I fell on my back with my left foot under me." (Italics supplied.)

On cross-examination, the plaintiff made practically the same statement, except in somewhat more detail, showing more distinctly that she was stepping on the running-board and not from it to the pavement when she was thrown, and that she was "twisted around" as she fell, and in that way fell on her back. Such statement was as follows:

"Q. Now I wish you would describe to the jury again just how you got off that car. I didn't understand it. Just what did you do as you approached Grove avenue and Robinson street?

"A. I rang the bell with my left hand after leaving Hanover avenue. I slided myself right over to this side of the car. I stood up before the car stopped. I caught hold of this running part of the car on the handle with my left hand.

"Q. You had some gloves in your right hand?

"A. I had some gloves in my hand.

"Q. Then, what happened?

"A. I stood there just for a second before the car stopped. The *second the car stopped,* or *just as soon* as the car stopped, I stepped down with my right foot.

"Q. To the ground you mean?

"A. To the running board.

"Q. With your right foot?

"A. Yes.

"Q. Then how did you get to the ground?

"A. I was thrown to the ground.

"Q. So you never deliberately stepped to the ground?

"A. No. I never deliberately stepped to the ground. I stepped down. As I was trying to take this foot down, the car jerked.

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"Q. You had just stepped with your right foot to the running board from the floor of the car, and your left foot was still on the floor of the car?

"A. I was taking my left foot down.

"Q. When you fell, is that right?

"A. *As soon as I stepped down with my right foot,* I was in the act of taking my left foot down: *before I got my left foot down, the car jerked, throwing me kind of forward,* or I went just that way. (Indicating.) And, as it took my feet from under me, I fell on my back; I was kind of twisted around; I fell on my left foot.

"Q. Do you mean to say you were made unconscious, Miss Bailey?

"A. The shock was so great to me and I was so nervous and excited, that I just did not recall anything that happened.

"Q. You are positive that the moment that the car stopped you stepped down with your right foot from the platform to the running board?

"A. The minute—the second that it stopped. It had stopped." (Italics supplied.)

The testimony of all of the witnesses for the defendant concur to the effect, in substance, that there was but one stop of the car in the locality in question, and that was at the regular stopping place aforesaid; and that the plaintiff was thrown from the car by its stopping while she was in the act of stepping from the platform where she stood to the running-board, just at the time the car stopped. That there was no jerk of the car, except that due to such cessation of movement; that such cessation of movement was not violent or unusual, but the contrary; and one of the passengers on the car, who sat on the west end seat immediately behind the plaintiff as she was getting off the car, testified (as a witness for defendant) that plaintiff, as she stepped on the running-board, "let go; as she let go, I grabbed at

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her to try to catch her, but she was too far gone. Q. You grabbed at her? A. Yes, sir, because I saw she was going to fall. The car had not come to a stop. Q. You didn't catch her though? A. No, sir, I missed her entirely."

E. Randolph Williams, H. W. Anderson, A. B. Guigon and *T. J. Moore,* for the plaintiff in error.

O'Flaherty & O'Flaherty, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the opinion of the court.

In view of the character of the evidence on the pivotal and only point in the case on which it is contended by plaintiff that there is a conflict of evidence, we find it necessary to consider or pass upon only one of the assignments of error, and that is that there was error in the action of the trial court in refusing to set aside the verdict and grant a new trial, on the ground that the verdict was without evidence to support it.

We are of opinion that this assignment of error is well taken.

The cause of action alleged in the declaration is the starting of the car while the plaintiff was in the act of alighting therefrom, and the consequent injuries to the plaintiff. It is not alleged that the plaintiff was thrown from the car by any act of negligence of the defendant in the stopping of the car; and it was practically admitted in argument that the facts of the case were not such that the plaintiff could have amended her declaration to so charge and have recovered because of negligence of the defendant in the stopping of the car.

The case turns upon the question whether the testimony of the plaintiff was of sufficient probative value to support

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the verdict of the jury in finding that the car was again started after it stopped, and thus threw the plaintiff therefrom as she was in the act of alighting.

Of course, if the latter were the fact, whether the movement of the car in starting was violent or not, would have been immaterial. It being unexpected would have been sufficient, since it was the duty of the defendant to have given a reasonable time for its passenger or passengers to alight before starting it again after receiving the signal to stop, and after having stopped the car.

But the plaintiff's testimony is fatally inconsistent with itself and with natural laws in its statement that she was thrown from the car by its starting forward after it had stopped, and yet that she was thrown "kind of forward." The physical fact is, in the absence of explanation not furnished by the evidence in this case, that it was physically impossible for the plaintiff to have been thrown *forward* from the car by its forward jerk or movement. By such a movement of the car—by its starting after it had stopped—she would, in her position, so far as shown by her own testimoney, have been thrown *backward* instead of "kind of forward." And the stopping of the car, as the plaintiff stepped down on the running-board (to use the plaintiff's language) "the second the car stopped, just at the time it stopped * * * and as I (she) was in the act of taking this left foot down * * *" would, according to natural laws, have jerked and thrown her "kind of forward"—as she in fact fell, as she testified. It is true that she testified "it took my feet from under me and I fell on my back." But she explained in her statement on cross-examination that she fell on her back because she was "kind of twisted around." Hence, she did not testify that she was thrown "backward" by the movement of the car forward, as it is argued for plaintiff. And she did not testify that her feet were carried forward from under her, in advance of her body, from which

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the inference could follow that her body was thrown backward by the movement of the car, as must have been true according to natural laws from her own narrative of the occurrence, if she had been thrown by a starting and not by a stopping of the car. On the contrary, her testimony that "When the car jerked, I was thrown this way (indicating), kind of forward," is directly opposed to the inference that her feet were carried forward, and her body thrown backward, since we knew that if an object a person is standing upon is at rest and it is moved, the tendency is to carry the feet forward and to throw the body of the person backward, and never forward, as the plaintiff testified she was thrown. She could not have been thrown forward by the starting of the car. The plaintiff's own testimony, therefore, when considered in the light of the known operation of natural laws, shows that she was thrown by the stopping and not by the starting of the car. No other inference could be drawn from her testimony as true and in accord with natural laws.

It is well established that the statutory rule (section 3484, Code of Virginia), under which we must consider the evidence in the case before us, "cannot compel us to accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated." *N. & W. Ry. Co.* v. *Strickler*, 118 Va. 153, 155, 86 S. E. 824, and *Virginian Ry. Co.* v. *Bell*, 113 Va. 492, 495, 87 S. E. 570, and authorities cited in these cases.

We are of opinion, therefore, that there is no evidence of probative value in the instant case that the plaintiff was thrown, as alleged, by the starting of the car while she was alighting therefrom; that the verdict of the jury is without evidence of sufficient probative value to support it on the pivotal question of fact aforesaid; and, hence, it must be set aside.

We should add that we do not mean to impute to the plain-

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tiff an intentional departure from the truth. To use, in part, her own language, it is evident from her own testimony that, "the shock was so great" and she was "so nervous and excited" that she "just did not recall" precisely how the accident "happened." Indeed, it is manifest from her own testimony that her statement that the car "had stopped" when she stepped on the running-board is coupled with the statement that her act of stepping on the running-board occurred "the minute—the second it (the car) stopped;" so that it is apparent that when she said the car had stopped before she was thrown, she was testifying to an opinion of hers afterwards formed as to the time of the stopping of the car in relation to her own act aforesaid, and not to a recollection of a fact which occurred at the time. Her testimony is, in truth, not that this was a fact, although at times put by her in that form. According to her own statement, as the incident in fact occurred, there was no interval of time between her own action aforesaid and the stopping of the car; they both occurred simultaneously.

For the foregoing reasons, we are of opinion to reverse the case and grant to the defendant a new trial, which will be accordingly done.

Reversed.

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Wytheville.

VIRGINIA RAILWAY AND POWER COMPANY v. KLAFF.

June 13, 1918.

Absent, Burks, J.

1. MALICIOUS PROSECUTION—*Want of Probable Cause.*—An action for malicious prosecution cannot be maintained unless it appears that the prosecution was instituted without probable cause.
2. MALICIOUS PROSECUTION—*Probable Cause—Burden of Proof.*—The burden of proving that there was no probable cause is upon the plaintiff.
3. MALICIOUS PROSECUTION—*Probable Cause—Questions of Law and Fact.*—If there is no conflict in the evidence, the existence or nonexistence of probable cause is a question of law for the court.
4. MALICIOUS PROSECUTION—*Probable Cause.*—Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected. Public policy requires that persons justly suspected of crime should be fairly prosecuted.
5. MALICIOUS PROSECUTION—*Probable Cause.*—It is reprehensible to institute criminal prosecutions lightly and thus to injure the character of honest men, but it should be constantly borne in mind that, in the interest of good order and society, those who have honest reason to believe that crimes have been committed and have knowledge of facts sufficient to justify such belief, ought not to be deterred from their public duty by the fear of having a jury assess damages against them if the accused should be acquitted. The courts, in the public interest, should maintain unimpaired the doctrine that the existence of probable cause is a complete defense to an action for malicious prosecution.
6. MALICIOUS PROSECUTION—*Probable Cause—Case at Bar.*—In the case at bar, plaintiff, a junk dealer, was indicted under section 3715, Code of 1904, charged with having bought and received railroad brass and metal, the property of the defendant rail-

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road company. There was also a count in the indictment charging him with the larceny of the property. The uncontradicted facts in the case clearly showed the existence of probable cause for the prosecution of plaintiff. A licensed junk dealer who receives recently stolen property, or who buys brass in violation of section 3715, may not escape just suspicion by merely showing, as the plaintiff here did, that he was frank, concealed no fact within his personal knowledge, and that he did not personally receive such goods. If he closes his eyes to the criminal or suspicious acts of his subordinates and employees, and accepts the benefit of such services to him, while he may, as in this case, upon his trial, secure an acquittal, he ought not to expect to escape prosecution.

7. MALICIOUS PROSECUTION—*Malice—Refusal to Prosecute Before Justice—Case at Bar.*—In the instant case counsel for the plaintiff insisted that malice was shown because the railroad's counsel refused to institute a prosecution before a justice of the peace, although urged to do so by the Commonwealth's attorney, where the plaintiff, upon the hearing, might have made a sufficient explanation.

Held: That the defendant, whether actuated by malice or prudence, had the right to decline to take the entire responsibility for instituting the prosecution and, after disclosing the facts, to leave that responsibility with the Commonwealth's attorney and the grand jury. And, therefore, the insistence of defendant's attorneys, who were sustained in their position by the judge of the court that the matter be brought before a grand jury, was of little consequence in showing malice on the part of defendant. Moreover, if the facts shown by the record in this case had been submitted to a justice of the peace, it would have been the duty of the justice to send the case to the grand jury.

Error to a judgment of the Court of Law and Chancery of city of Norfolk, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

E. Randolph Williams, T. Justin Moore, W. H. Venable and *H. W. Anderson*, for the plaintiff in error.

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Rumble & Campe, for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

This case has been previously before this court, and a demurrer to the declaration was overruled. *Klaff* v. *Va. Ky., etc., Co.,* 120 Va. 347, 91 S. E. 173. The case has since been tried and there was a verdict and judgment for the plaintiff, of which the defendant company is here complaining.

This is an action by Klaff against the Virginia Railway and Power Company to recover damages for an alleged malicious prosecution. Isaac Klaff, a merchant handling hides and metal, licensed as a junk dealer, and engaged in the general junk business, was indicted under section 3715 of the Code, and charged with having bought and received railroad brass and metal, consisting of certain car journal bearings, car check plates, trolley wheels, and armature bearings, the property of the defendant company, with intent to defraud, from Samuel Frost and H. Coplan. There was also a count in the indictment charging him with the larceny of the same property. At the trial, the Commonwealth's attorney, with the consent of the presiding judge, recommended a verdict of acquittal, and he was acquitted by the jury.

It is fundamental that an action for malicious prosecution cannot be maintained unless it appears that it was instituted without probable cause. The burden of proving that there was no probable cause is upon the plaintiff, and if there is no conflict in the evidence, the existence or nonexistence of probable cause is a question of law for the court. *Singer Mfg. Co.* v. *Bryant,* 105 Va. 423, 54 S. E. 320; *Cox* v. *Lauritsen,* 126 Minn. 128, 147 N. W. 1095; *Williams* v. *Pullman Co.,* 129 Minn. 97, 151 N. W. 895, Ann. Cas. 1916 E, 374.

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The pertinent facts leading up to this prosecution, so far as we deem it necessary for the determination of the question before us to state them, shown by the testimony, considered as upon a demurrer to the plaintiff's evidence by the defendant, are these: An agent of the defendant company visited the store of the plaintiff on November 3, 1914, selected and bought a small piece of brass from the stock exhibited to him, and evidently suspecting that some of its property was in the possession of the plaintiff, accompanied by a police officer, went to the shop of the plaintiff on the next morning, November 4, 1914, in search of it. They found there some barrels headed up, and upon their request these barrels were opened and found to contain a considerable quantity of brass which was identified as the property of the company. When asked from whom he had received this property, it was explained that his clerks had bought it from Samuel Frost and H. Coplan, and his books were produced indicating that on the previous day they had bought for him 116 pounds of this brass from Frost and 216 pounds thereof from H. Coplan, making a total of 332 pounds. The brass, however, which was then identified as the property of the company, which was weighed by the plaintiff, amounted to 445 pounds. No sufficient explanation of this discrepancy was then made or appears in the record. Frost was a canvasser of the plaintiff, appointed under the statute (tax bill, section 69 [Code 1904, page 2228]), which prohibits any person from canvassing for the purpose of buying junk or any other like commodity for a licensed junk dealer, or for sale to such junk dealer, or to any other person, unless authorized so to do in writing by some licensed junk dealer and appointed by him. The statute requires each junk dealer who desires to appoint such canvassers to take out a separate license for each canvasser.

After the plaintiff had given the names of the persons from whom he had received the property, they were sent

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for. Frost, his canvasser, confirmed the statement of the plaintiff as to the property alleged to have been received from him, but said that he had bought it from a negro whom he could identify. He was promptly taken to the car barns of the company and certain employees were lined up before him, and he identified one of them as the person from whom he had received such property. This negro was promptly prosecuted and convicted of the larceny thereof. Coplan denied that he had sold the plaintiff any of the property referred to, though it clearly appears that he had the day before sold him, along with other junk, certain property described as 150 pounds red brass and sixty-six pounds yellow brass. Some of this identified property had the initials of the company upon it, and some had certain private marks which could be discerned, though concealed from common observation by grease.

Section 69 of the tax bill, referring to junk dealers, requires that at the time of each purchase of junk a record shall be kept, which shall be at all times open to the inspection of the judges of the criminal courts, the chief of police, the captains and sergeants of the police of the city, town, or county, wherein said business is being conducted, or any or either of them, the sergeant and sheriff of such city, town, or county, or other officer with police jurisdiction.

The plaintiff's counsel argues that because the plaintiff did not personally receive these stolen goods—this brass—which it is a felony to buy or receive, with intent to defraud, that therefore it should have been perfectly apparent to the defendant that he was innocent of any criminal intent; hence, that it is also clear from this and other circumstances that there was no probable cause for the prosecution, and that from this fact the malice of the defendant (which is another element essential to maintain the action) may be inferred. It must be remembered, however, that the statute, section 3715 of the Code, makes the possession of such

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property which has been bought or received from any other person than the manufacturer thereof, or of his authorized agent, or of a regularly licensed dealer therein, *prima facie* evidence of such fraudulent intent. Then again, the evidence shows that the plaintiff had possession of goods recently stolen, and the only explanation which was then or thereafter made as to this possession was that it had been bought in the usual course of his business, part from a canvasser selected by him and duly licensed to canvass for junk for his (the plaintiff's) benefit, and part from Coplan, who, however, denied having sold any of the property which was identified and claimed by the defendant.

The defendant sent its witnesses to the Commonwealth's attorney to testify as to these transactions at the December term, but the Commonwealth's attorney at that time refused to send them before the grand jury, and later told them to come back at the next term, in January. The Commonwealth's attorney urged that the defendant should secure a warrant against the plaintiff and have the charge heard by a justice, his reason being that he thought that inasmuch as from these facts only a *prima facie* case was made out against the plaintiff, he ought to have a chance to explain his possession of the property, but upon the insistence of the company's attorneys, and because the judge of the court sustained them in their position that any citizen had the right to go before a grand jury to testify as to suspected crimes, an indictment was prepared charging the buying and receiving of railroad brass and metal with intent to defraud, under section 3715, to which the Commonwealth's attorney, added the count charging the larceny of the same goods. The witnesses were then sent before the grand jury. which found the indictment. Counsel for the plaintiff insist that malice is also shown because the company's counsel refused to institute a prosecution before a justice of the peace where the plaintiff, upon the hearing, might have made a

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sufficient explanation, but we attach little consequence to this circumstance, because the defendant, whether actuated by malice or prudence, had the right to decline to take the entire responsibility for instituting the prosecution and, after disclosing the facts, to leave that responsibility with the Commonwealth's attorney and the grand jury. Then again, if the facts recited and shown by this record, together with all of the explanation which the plaintiff has made of the transaction indicating frankness and tending to show innocence of any criminal intent, had been submitted to a justice of the peace upon a warrant charging the crime or crimes referred to, it would still have been the duty of the justice to send the case to the grand jury, for these recited facts show a *prima facie* case, and this, without any reference to the testimony offered by the defendant company tending still further to implicate the plaintiff, because we are now considering this case as upon a demurrer to the evidence, and are therefore confined to the testimony of the plaintiff and his witnesses together with such other testimony as is not in conflict therewith.

Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected. Public policy requires that persons justly suspected of crime should be fairly prosecuted.

In *Faris* v. *Starke*, 3 B. Mon. (Ky.) 4, this is said: "If every man who suffers by the perpetration of a crime were, under the penalty of heavy damages, to ascertain before he commences a prosecution, that he has such evidence as will ensure a conviction, few prosecutions would be set on foot; the guilty would escape while conclusive evidence was sought for; offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter. The law, therefore, protects the prosecutor, if he have reasonable or probable ground for the prosecu-

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tion, that is, if he have such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation."

Of course, it is reprehensible to institute criminal prosecutions lightly and thus to injure the character of honest men, but it should be constantly borne in mind that, in the interest of good order and society, those who have honest reason to believe that crimes have been committed and have knowledge of facts sufficient to justify such belief, ought not to be deterred from their public duty by the fear of having a jury assess damages against them if the accused should be acquitted. The courts, in the public interest, should maintain unimpaired the doctrine that the existence of probable cause is a complete defense to an action for malicious prosecution.

The uncontradicted facts in this case, as we understand them, clearly show the existence of probable cause, and a licensed junk dealer who receives recently stolen property, or who buys brass in violation of section 3715, may not escape just suspicion by merely showing, as the plaintiff here did, that he was frank, concealed no fact within his personal knowledge, and that he did not personally receive such goods. If he closes his eyes to the criminal or suspicious acts of his subordinates and employees, and accepts the benefit of such services to him, while he may, as in this case, upon his trial, secure an acquittal, he ought not to expect to escape prosecution.

Here, the evidence of the plaintiff and his witnesses, coupled with the uncontradicted testimony of defendant's witnesses, shows that there was probable cause for this prosecution; therefore, the court should have sustained the motion of the defendant to set aside the verdict and grant a new trial. The judgment will be reversed, and the case remanded for a new trial, if the plaintiff shall be so advised.

Reversed.

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Wytheville.

WATKINS V. FORD.

June 13, 1918.

Absent, Burks, J.

1. REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS—*Sale of Property—Section 2436-b of the Code of 1904—Constitutional Law.*—Section 2436-b, Code of 1904, which authorizes the sale of an estate, real or personal, given by deed or will to a person for life, with a vested remainder to another, whether the vested remainderman be an infant or adult, to the extent to which it affects the rights of adult remaindermen, is unconstitutional.
2. CONSTITUTIONAL LAW—*Necessity of Determination of Constitutionality.*—If a case can be determined upon other grounds, the constitutionality of a statute will not be drawn in question or passed upon.
3. REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS—*Sale of Property—Section 2436-b, Code 1904—Case at Bar.*—In the instant case testator devised a farm to his widow for life, with remainder to his nephews and nieces. The widow filed a bill under section 2436-b of the Code of 1904, praying that the farm might be sold and the proceeds invested for the benefit of the widow and the other persons interested. The reasons assigned for the sale were that the property was depreciating and that the widow was without means with which to keep up the property and was herself unable to manage the property. There was a general allegation that it was to the best interest of all parties directly or contingently interested that the land should be sold. Of the known remaindermen, sixty-eight were adults and five were infants; and of the thirty-six adult parties and two infants actually before the court, all the adults and the guardian *ad litem* of the infants demurred to the bill, and opposed a sale of the property. Without determining whether section 2436-b, Code of 1904, so far as it applies to infant remaindermen is constitutional, it was held that the case made by the bill would not justify the exercise of the jurisdiction of the court under that statute to sell the remainder interest of the infants in the farm.

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4. INFANTS—*Sale of Infants' Lands.*—Nowhere has the property of infants been more carefully guarded against injudicious sales than in this State. The legislature has wisely surrounded such sales with all reasonable safeguards and the courts have been astute to give effect to this protective legislation.
5. REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS—*Sale of the Property—Infant Remaindermen.*—A court of equity will not relieve the financial distress of a life tenant at the expense of an infant remainderman.

Appeal from a decree of the Circuit Court of Chesterfield county. Decree for defendants. Complainant appeals.

Affirmed.

The opinion states the case.

R. R. Florence, Brockenbrough Lamb and *W. L. Masinter,* for the appellant.

David Meade White, Smith & Gordon, E. B. Thomason and *Melvin Flegenheimer,* for the appellees.

WHITTLE, P., delivered the opinion of the court.

Appellant's bill (which was dismissed on demurrer) was filed under section 2436-b of the Code, and presents the following case: That plaintiff is the widow of W. C. Watkins, who died in the year 1912 testate, seized of a farm in Chesterfield county containing 467 acres, upon which she and her husband resided; that the land lies about five miles from the city of Richmond, and is traversed by the Petersburg turnpike, and touches the Richmond and Petersburg electric line at several stops; that testator had no children, and devised the farm to appellant for life, with remainder to his nephews and nieces. The bill prays that the land may be sold and the proceeds invested for the benefit of plaintiff

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and the other persons interested therein; or, if the court deems it advisable, that her life estate in the proceeds of sale may be commuted.

The reasons assigned for the sale in substance are: That while during the lifetime of testator the farm was cultivated to good advantage, since his death plaintiff has been unable to manage it and has rented it out, and that the property has steadily gone down; that the buildings, fences and other improvements have depreciated in value, and the open land in productiveness; that the woods on the place are subject to fires from two adjoining railroads; that plaintiff leased the farm for a money rent, but had been notified by the tenant that he would quit at the end of his term, but that he had held over and plowed up the hay crops on the land, but denied liability for rent and refused to pay it; that the best offer she has had for the place was one-third of the crop, which would afford a scant return on the investment; that she is without means with which to keep up the property, and being alone without children is unable to stay there. There is a general allegation based on these special averments, "that it is to the best interest of all parties directly or contingently interested" that the land should be sold.

Of the known remaindermen, sixty-eight are adults and five are infants; and of the thirty-six adult parties and two infants actually before the court, all the adults and the guardian *ad litem* of the infants demurred to the bill, and are opposing a sale of the property.

In the case of *Curtis* v. *Hiden*, 117 Va. 289, 84 S. E. 664, this court in construing section 2436-a, a companion statute to section 2436-b, held: "If section 2436-a * * * is to be construed as conferring a right upon the life tenant by the curtesy, or in dower, to demand and require a sale of the real estate in which she is interested, where all the parties are *sui juris*, and the estate of the remaindermen is vested,

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the statute is unconstitutional as an unwarrantable interference with the rights of property, and as denying the equal protection of the laws."

In controlling principle, that case is indistinguishable from the case in judgment, so far as the interests of the adult remaindermen in the land in controversy are concerned; and section 2436-b, to the extent to which it may affect the rights of that class of remaindermen, is unconstitutional.

The title of the act (incorporated in the Code as section 2436-b)—Acts 1897-8, page 404—reads as follows: "An act to authorize the sale of an estate, real or personal, given by deed or will to a person for life, with a vested remainder to another, whether the vested remainderman be an infant or adult." It is insisted on behalf of appellant that even though the act be unconstitutional as to adult remaindermen, it is within the competency of the legislature to empower courts at the suit of a life tenant to sell the remainder interests of infants in the estate; that the provisions of the act are not interdependent but are separable; and that it should be upheld as to the latter class though declared invalid as to the former. If, however, this contention be sound (as to which we intimate no opinion) it is quite clear that the case made by the bill would not justify the exercise of such jurisdiction.

It is well settled by the decisions of this court that if a case can be determined upon other grounds, the constitutionality of the law will not be drawn in question or passed upon.

In *Board of Supervisors* v. *Commonwealth, etc.*, 116 Va. 311, 81 S. E. 112, it was held: "Whenever the constitutionality of an act of the legislature is distinctly presented and necessary to the decision of a particular case, it is the duty of the court to determine the question; but if the case before the court can be determined upon other grounds, the court,

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out of respect for the legislature, will not question the constitutionality of its action." *Ex parte Randolph,* Fed. Cas. No. 11, 558, 2 Brock. 448-9, 678-9; *Griffin* v. *Cunningham,* 20 Gratt. (61 Va.) 31, 33-4; *Gayle & Eason* v. *Commonwealth,* 115 Va. 958, 80 S. E. 741; Cooley's Const. Lim. (6th ed.), page 196.

The allegations as to the expediency of a sale are predicated upon a sale of the *entire estate,* not a sale of the life estate and the undivided five shares of the infants in a total holding of seventy-three shares in remainder. The bare suggestion of the proposition would suffice to condemn it. Moreover, the allegations of the bill are not based on common benefit to plaintiff and defendants, but are intended to alleviate a situation self-imposed by the inability of the life tenant to manage her property, or else by conditions for the existence of which the remaindermen are in no wise responsible, while the alleged benefits to the infants from a sale rest wholly upon the general statement that it will be to their advantage.

In *Curtis* v. *Hiden, supra,* it was held: "The fact that the taxes on the land are onerous and that the life tenant cannot derive a profit without cutting and removing the timber from the land, does not alter the case. Equity has no jurisdiction to take the property of one and transfer it to another when neither is under any disability."

Nor will a court of equity relieve the financial distress of a life tenant at the expense of an infant remainderman.

In the *Matter of Steele,* An Infant, 19 N. J. Eq. 120, the court said: "The reversionary estate of an infant will not be sold because there may be a great advantage in the sale to the tenant for life, when the benefit to the infant is doubtful or inappreciable."

In the *Matter of Heaton,* 21 N. J. Eq. 221, the court said: "It is not a sufficient reason for the sale of infants' reversionary estate in lands, that the property is so much out of

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repair that it would now cost more to put it in tenantable repair than the income would justify, when the property has been in the actual possession of the life tenants. If they have suffered it to get out of repair, they are bound to put it in as good repair as it was when they entered upon it." And further, at page 223 of 21 N. J. Eq., it is said: "The only question in the case is, will this property bring as much now as it will at the death of the life tenant, ten or twenty years hence? If it will not, it is not for the interests of the infants to sell, that is, if the life tenant is to receive a share of the proceeds, or of the income from them, according to the rules of this court."

In the *Matter of Margaret Jones*, 2 Barb. Ch. (N. Y., 22, the chancellor denying the prayer of the petition, said: "It was not the practice of the court to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; nor was it ever done for the mere purpose of increasing the income of the adult owner of a present interest in the estate. That, in this case, the testator evidently intended that his children should be supported out of the income of the real and personal estate devised to his wife, and that the capital should be reserved until her death, that it would, therefore, be contrary to the spirit of the will, to allow their interests in the land to be sold for their present support, leaving the mother to enjoy the whole income, for life, for her own use, after they should be old enough to earn their living."

Nowhere has the property of infants been more carefully guarded against injudicious sales than in this State. The legislature has wisely surrounded such sales with all reasonable safeguards; and the courts have been astute to give effect to this protective legislation. The case of *Coleman* v. *Va. Stave Co.*, 112 Va. 61, 70 S. E. 545, affords a conspicuous illustration of the rule of decision in that class of cases.

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In *Schroeder* v. *Woodward,* 116 Va. 506, 82 S. E. 192, the court held: "The statutes of this State providing for the sale of lands of persons under disability recognize the inviolability of trust estates from lease or sale by providing that there shall be no such lease or sale, unless it be clearly shown, independently of any admission in the pleading, that the interest of the beneficiaries will be promoted and 'the rights of no other person will be violated' by such lease or sale."

This property is eligibly located within a few miles of the city of Richmond, and the rapidity with which that city is extending its borders in all directions indicates that at no remote date the land will be embraced within the city limits and thereby increased in value.

The result of our consideration is that the decree is plainly right and should be affirmed.

Affirmed.

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Wytheville.

WILKINS V. HENDERSON.

June 13, 1918.

1. INSTRUCTIONS—*Evidence to Support.*—In a statutory proceeding to ascertain the true boundary line between the lands of the plaintiff and the defendant, the evidence showed that the land in controversy was in timber, so overgrown with underbrush that one could not see through it, and that the location of the line could only be fixed by a survey. There was no evidence that it was in any way improved or cultivated, and the only acts of ownership alleged were the occasional cutting of trees and raking of shatters. No instruction was given as to the effect of these alleged acts of ownership, but the court instructed the jury that if the defendant "entered upon the land in controversy, improving and cultivating a part and claiming title to the whole, she was in actual possession of the whole land within her boundaries and what is the whole is to be determined by the limits, owned or claimed."

   Held: That as there was no other evidence even tending to support the instruction given the instruction was misleading, without evidence to support it, and constituted error to the prejudice of the plaintiff.

2. INSTRUCTIONS—*Must be Complete—Directing Verdict—Partial View of the Evidence.*—It is error to give an instruction directing a finding for the plaintiff or the defendant on an incomplete or partial view of the evidence.

3. INSTRUCTIONS—*Must be Complete—Directing Verdict—Partial View of the Evidence—Case at Bar.*—In the instant case, the defendant relied upon two defenses: First, that the land in controversy was within the boundaries called for by her deed, and, second, that if not within such boundaries, the defendant had acquired title by adverse possession. Two instructions were tendered by the plaintiff and rejected by the court. Each of the instructions asked was applicable solely to the defense of title by adverse possession, and, although the land in controversy may have been within the boundaries of the defendant's deed, and passed to her by her deed, yet each of these instructions directed a verdict in favor of the plaintiff.

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The land in controversy was a parcel of a large tract, much of which was arable land, and had been in the possession of the defendant for a long number of years. The defendant entered into possession of a part of the tract, claiming title to the whole, according to the boundaries claimed in her deed, thus extending her possession to the entire tract, including the land in controversy, if it was within her boundary. As the plaintiff did not claim title by adverse possession, the defendant was entitled under the evidence to a verdict in her favor if the land in controversy was within the calls of her deed, and yet, each of the instructions directed a finding for the plaintiff unless defendant established her claim of title by adverse possession.

Held: That this was manifest error, and justified the court in refusing to grant the instructions.

4. NEW TRIAL—*Verdict Contrary to the Evidence—Conflicting Evidence.*—In a statutory proceeding to ascertain the true boundary of lands where the evidence on the subject of the location of the boundary was conflicting, the court was without power to set aside the verdict as contrary to the evidence.

Error to a judgment of the Circuit Court of Northampton county, in a statutory proceedings to ascertain the boundary of land. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Stanley Scott, for the plaintiff in error.

John E. Nottingham, Jr., for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is a proceeding under the statute (Acts 1912, page 133) to ascertain the true boundary line between the lands of the plaintiff and the defendant. The land in controversy is a triangular shaped piece of uninclosed woodland, thickly covered with undergrowth. There was a verdict and judgment for the defendant, to which judgment this writ of error was awarded.

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The granting of instruction No. 1, asked for by the defendant, is assigned as error on the ground that there was no evidence to support it, and we are of opinion that the error is well assigned.

The instruction was as follows: "The court instructs the jury that if you believe from the evidence that Bessie R. Henderson, by virtue of her deed from John M. Henderson and his predecessors in title entered upon the land in controversy, improving and cultivating a part and claiming title to the whole, she was in actual possession of the whole land within her boundaries and what is the whole is to be determined by the limits, owned or claimed."

The evidence shows that the land in controversy is in timber, so overgrown with underbrush that you could not see through it, and that the location of the line could only be fixed by a survey. There was no evidence that it was in any way improved or cultivated, and the only acts of ownership alleged were the occasional cutting of trees and raking of shatters. No instruction was given as to the effect of these alleged acts of ownership, and there is no other evidence even tending to support the instruction given. The instruction was misleading, without evidence to support it, and constituted error to the prejudice of the plaintiff.

It is also assigned as error that the court refused to give instructions "E" and "F" tendered by the plaintiff. These instructions were as follows:

"E. The court instructs the jury that there can be no adverse possession of uncleared land, unless such possession is actual, exclusive, visible and notorious; and that a mere claim to possession accompanied by the occasional cutting of timber, the prevention of trespassers, occasional raking of shatters, and assertion of title, is not sufficient, but it must be such occupation, use or holding of the property, or change in its character, as will make such claim-

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ant, during the period of fifteen years, prior to the commencement of this suit, continuously, subject to be treated as a trespasser by the plaintiff, and that unless the defendant did so occupy and use the land in question, the jury must find for the plaintiff."

"F. The court instructs the jury that even though the defendant occupied and possessed the land of Mr. Wilkins, which is in question, but did so through a misapprehension or mistake as to the boundaries of his land, with no intention to claim as his own that which did not belong to him, but only intended to claim to the true line, wherever that may be, then they must find for the plaintiff.

We have repeatedly held that it is error to give an instruction directing a finding for the plaintiff or the defendant on an incomplete or partial view of the evidence. *Sun Life Ins. Co.* v. *Bailey*, 101 Va. 443, 44 S. E. 692; *Life Ins. Co.* v. *Hairston*, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989, and cases cited. In the instant case, the defendant relied upon two defenses: First, that the land in controversy was within the boundaries called for by her deed; and, second, that if not within such boundaries, the defendant had acquired title by adverse possession. Each of the instructions asked was applicable solely to the defense of title by adverse possession, and, although the land in controversy may have been within the boundaries of the defendant's deed, and passed to her by her deed, yet each of the instructions directed a verdict in favor of the plaintiff. The land in controversy was a parcel of a large tract, much of which was arable land, and had been in the possession of the defendant for a long number of years. The defendant entered into possession of a part of the tract, claiming title to the whole, according to the boundaries claimed in her deed, thus extending her possession to the entire tract, including the land in controversy, if it was within her boundary. As the plaintiff did not claim title by adverse possession, the

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defendant was entitled under the evidence to a verdict in her favor, if the land in controversy was within the calls of her deed, and yet, each of the instructions aforesaid directed a finding for the plaintiff unless she established her claim of title by adverse possession. This was manifest error and justified the court in refusing to grant the instructions.

It was also assigned as error that the trial court refused to set aside the verdict as contrary to the evidence. It is a sufficient answer to this objection that the evidence on the subject of the location of the boundary was conflicting. Therefore, the court was without power to set aside the verdict.

For the error committed in giving instruction No. 1, above mentioned, the judgment of the trial court must be reversed.

Reversed.

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Wytheville.

WOLFORD AND OTHERS v. JACKSON AND OTHERS.

June 13, 1918.

1. MERGER—*Vendor and Purchaser.*—The appellees gave the appellants an option to purchase a certain tract of land, within sixty days, at a certain price. This option was closed by a letter addressed to a bank, signed by all the parties, which, in some respects, varied the terms of the option contract, and constituted the final agreement of the parties for the sale and purchase of the land.

   Held: That the option contract was merged in the contract evidenced by the joint letter of the parties to the bank.

2. VENDOR AND PURCHASER—*Contract of Sale—Waiver.*—Under a contract for the sale of land, the vendees refused by letter the deed tendered them by the vendors on the ground that its description of the land did not definitely identify it, but stated that if the vendors were "willing to furnish us a plat and to make the same a part of the deed, which plat will definitely show the lines, we are willing to pay the purchase price agreed upon."

   Held: That whatever might have been the rights of the vendees under the contract, they waived everything but a single point by this letter and staked their whole case on their right to demand a deed containing a better description of the land than that contained in the deed tendered.

3. VENDOR AND PURCHASER—*Deeds—Description of Land.*—Where under a contract of sale, the vendors tendered a deed containing the same description of the land as that contained in the contract of sale and in every deed previously conveying the land, and the land could be readily and adequately identified from the description given, the vendees could not refuse to receive the deed on the ground that the description of the land was insufficient, in that it did not show the number of feet or chains on the boundaries, and demand a survey and plat to be made a part of the deed.

4. SPECIFIC PERFORMANCE—*Transfer of Land by Vendors—Parties to Suit.*—Where vendors, seeking to enforce specifically a contract of sale against the vendees, had transferred the property

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to a holding company with full notice of the rights of all the parties, and without consideration, the holding company occupying the position of a mere trustee, the vendors had a sufficient interest in the property to maintain suit for specific performance in their own names.

5. SPECIFIC PERFORMANCE—*Tender of Deed—Necessity.*—Whether or not a vendor in a suit for specific performance must tender a deed with his bill must be regarded as an open question in this State, but in the case at bar, as the vendees declined to accept any deed that did not contain the courses and distances of the land, and this the vendors had the right to decline to give it would have been futile to have required the tender of a deed which the purchasers had declared in the most explicit terms they would not accept.

6. VENDOR AND PURCHASER—*Sufficiency of Deed—Execution by Vendors.*—The mere fact that the contract of sale stipulated that the vendors would execute and deliver, or cause to be executed and delivered a deed with covenants of general warranty, would not release the vendors from their personal obligation to unite in the conveyance and covenants. Unless the contract expressly provides that the deed shall be made by a third person, it must be made by the vendor himself.

7. VENDOR AND PURCHASER—*Sufficiency of Deed—Execution by Vendors.*—In the case at bar, however, the complainants stated in their bill that they have at all times been ready, willing and able to comply with the terms of their agreement, and that the holding company was willing and able to convey the land to the defendants upon their compliance with the terms of the contract; and the bill contains the usual prayer for general relief. Therefore it was entirely competent for the court, with all the parties before it, and in pursuance of the prayer for general relief to require the vendors to unite with the holding company in a deed conveying the land to the defendants with covenants of general warranty of title.

Appeal from a decree of the Circuit Court of city of Williamsburg and county of James City. Decree for complainants. Defendants appeal.

Amended and Affirmed.

The opinion states the case.

Frank Armistead, for the appellants.

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Henley, Hall, Hall & Peachy, for the appellees.

BURKS, J., delivered the opinion of the court.

This is a suit for the specific performance of a contract for the sale of real estate. Louis J. Hansen, who was the owner of a tract of thirty-five acres of land near the city of Williamsburg, gave to the appellees, E. P. Jackson and H. P. Hammond, on February 28, 1916, an option to purchase this land, within three months, at the price of $4,250, of which the sum of $50 was paid in cash, and for the residue of which credits were extended. On March 8, 1916, the appellees, Jackson and Hammond, gave the appellants an option to purchase the same land, within sixty days, at the sum of $7,000, of which sum appellants paid $500 in cash, and for the residue credits were extended. On May 8, 1916, this latter option was closed by a letter addressed to the Bank of Williamsburg, signed by all of the parties, and which is as follows:

"May 8, 1916.

"Bank of Williamsburg, Inc.,
Williamsburg, Va.

"Gentlemen:

"We hand you herewith $1,250.00 and a contract between F. P. Jackson and H. P. Hammond, of the one part, and J. M. Wolford, Wm. F. Downing and Benj. Fisch, of the other part.

"You are to hold this money and contract until Mr. Frank Armistead, attorney at law, of Williamsburg, Virginia, can examine the title to this property, and as soon as said examination can be made and Mr. Armistead accepts said title, then the said J. M. Wolford, Wm. F. Downing and Benj. Fisch are to pay you $2,500 and to execute notes for the payment of the balance of the purchase price of said

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property, according to the terms of said contract, and to execute a deed of trust conveying said property in trust to secure the payment of said note; and you are to turn over to the said E. P. Jackson and H. P. Hammond said $3,750.00 and a deed of trust and the note therein secured, upon the said F. P. Jackson and H. P. Hammond executing, and delivering, or causing to be executed and delivered, a good and sufficient deed, with general warranty, conveying said real estate to the said J. M. Wolford, Wm. F. Downing and Benj. Fisch.

"If said title is not found clear, and cannot be made good, then you are to return said $1,250.00 to J. M. Wolford.

"Title to be examined in ten days from the date hereof."

This letter, in some respects, varied the terms of the option contract, and constituted the final agreement of the parties for the sale and purchase of the land. The title was promptly examined by Mr. Armistead, but some delay was occasioned in clearing up and removing minor defects found to exist in the title. The title, however, was finally rendered acceptable, and the vendors procured from Louis J. Hansen a deed conveying the land, with general warranty, to the appellants, and the vendors executed a quit-claim deed of the property to the appellants, and delivered both deeds in escrow to the Bank of Williamsburg. The appellants, thereupon, executed and delivered to said bank the deed of trust to secure the deferred payments of purchase money called for by their contract, but failed to deliver to said bank either the money or the notes called for by said contract. When pressed to complete the performance of their contract, the appellants refused to do so on the ground that the deed from Hansen conveying the land to them did not give the metes and bounds of the land conveyed, and on June 12, 1916, they addressed the following letter to Jackson and Hammond:

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"Williamsburg, Va., June 12, 1916.

Messrs. F. P. Jackson and H. P. Hammond,

"Williamsburg, Va.

"Gentlemen:

"We are ready and willing to comply with our contract to purchase from you the thirty-five acres tract of land which you purchased or agreed to purchase, from Lewis J. Hansen, but the description in the deed which has been deposited in the Bank of Williamsburg is not such description of the land that we could take the deed and identify the land, as there are no corners or definite boundaries given, and under our contract we claim that we are entitled to a deed definitely describing the land which we are purchasing, and therefore demand a deed showing the number of feet or chains that this land fronts on the road, and the number feet or chains on the other boundaries. As the description in the deed from Hansen, and the description in the deeds through which Hansen claims, are so indefinite, we do not see how you can give us a deed that would sufficiently describe this land unless the land is surveyed and platted and the survey and plat made a part of the deed.

"If you are willing to furnish us a plat, and to make the same a part of the deed, which plat will definitely show the lines, we are willing to pay the purchase price agreed upon. If such a deed is not furnished within five days, we will consider the deal off and will demand that our money be refunded.

"Yours truly,

"J. M. WOLFORD,

"WM. F. DOWNING,

"BENJ. FISCH."

It will be observed that the contract does not call for any plat or survey, and the statement of the letter is simply that appellants *claim* that under the contract they are entitled to a more definite description of the land. The ven-

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dors refused to furnish the plat called for, and thereupon all further negotiations between the parties ceased. The vendors then procured from Hansen and placed upon record a deed conveying the land to the Power City Investment Company, and a few days thereafter instituted this suit in their own names for a specific performance of the contract of sale. Jackson and Hammond and one other person were the only stockholders of the Power City Investment Company, and were its officers. The company was a mere holding corporation of the title of real estate purchased by Jackson and Hammond, and had no other interest in the property. All of the officers and stockholders of the company had full notice of the whole transaction. The Power City Investment Company was made a party defendant to this suit and filed its answer, which contains the following statement:

"True it is that on the 12th day of June, 1916, Lewis J. Hansen conveyed to this respondent the real estate mentioned and described in said bill; and that this respondent is the holding company of the complainants in the conduct of their real estate business. This respondent avers that it is ready, willing, able and anxious to convey the real estate mentioned and described in said bill to J. M. Wolford, Wm. F. Downing and Benjamin Fisch, upon their complying with the terms of their agreement entered into between them and the complainants, on the 8th of May, 1916."

From a decree in favor of the complainants, this appeal was allowed. The case lies within narrow limits, and it will be unnecessary to consider many of the questions discussed on the argument. The option contract of March 8, 1916, was merged in the contract of May 8, 1916, evidenced by the joint letter of the parties to the Bank of Williamsburg. The latter is the contract sought to be enforced. Whatever may have been the rights of the appellants under

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this contract, they waived everything but a single point by their letter of June 12, 1916, and staked their whole case on their right to demand a deed containing a better description of the land than that contained in the deed tendered, and say, "if you are willing to furnish us a plat and to make the same a part of the deed, which plat will definitely show the lines, we are willing to pay the purchase price agreed upon." The appellants had no right to demand a plat, and the vendors were under no obligation to furnish it. Every deed previously conveying this land, the option under which Hansen sold, and the option under which appellants bought, all described the land as: "All of that certain tract of land lying and being in Bruton district, York county, State of Virginia, containing thirty-five acres, more or less, and bounded as follows: On the west by the Old Free road; on the north by the land of the Old Dominion Land Company; on the east by the land of Neils P. Peterson, and on the south by the land of Anton Rasmussen;" and the evidence shows that the land could be readily and adequately identified from the description given. The deed tendered, therefore, contained a sufficient description to convey the land purchased by the appellants. *Merritt* v. *Bunting*, 107 Va. 174, 57 S. E. 567, 12 Ann. Cas. 954, and cases cited.

Objection was made that Jackson and Hammond could not maintain this suit in their own names because they had no interest, legal or equitable, in the subject-matter thereof; and that their entire interest was transferred to the Power City Investment Company by the deed to it from Hansen. But this is a mistaken view of the situation. The Power City Investment Company took its deed with full notice of the rights of all the parties, and without consideration. It held the property in trust, for the benefit of Jackson and Hammond, and subject to the rights of the parties under the contract of May 8, 1916. It occupied the position of a mere trustee. *Cummins* v. *Beavers*, 103 Va. 230, 48 S. E.

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891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986. See also text and cases cited 36 Cyc. 761; Waterman Spec. Per., pp. 725-6; Bispham's Eq., pp. 424-5.

The further objection is made that the vendors did not tender any deed with their bill. Whether or not such a tender is necessary must be regarded as an open question in this State (*Whitten* v. *Saunders*, 75 Va. 563, 570; *Wood* v. *Walker*, 92 Va. 24, 22 S. E. 523, 1 Va. Law Reg. 442), but it need not be now decided, as the appellants declined to accept any deed that did not contain the courses and distances of the land, and this, as we have seen, the vendors had the right to decline to give. It would have been futile to have required the tender of a deed which the purchasers had declared in the most explicit terms they would not accept. *White* v. *Dobson*, 17 Gratt. (58 Va.) 262; *Matney* v. *Barnes*, 116 Va. 713, 82 S. E. 801. See also text and cases cited, 36 Cyc. 705; Waterman Sp. Per., secs. 446, 450.

The next assignment of error is that this suit is an effort on the part of the vendors to force the appellants to accept a deed from the Power City Investment Company, with whom it did not contract, and whose conveyance and covenants it never agreed to accept. The mere fact that the contract stipulated that the vendors would execute and deliver, or *cause to be* executed and delivered a deed with covenants of general warranty, would not release the vendors from their personal obligation to unite in the conveyance and covenants.

"It is generally held that unless the contract expressly provides that the deed shall be made by a third person, it must be made by the vendor himself, even though the words of the contract are that the vendor execute or cause it to be executed." *Gottschalk* v. *Meisenheimer*, 62 Wash. 299, 113 Pac. 769, 115 Pac. 79. To the same effect, see *Steiner* v. *Zwickey*, 41 Minn. 448, 43 N. W. 376; *Birmingham Matinee Club* v. *McCarthy*, 152 Ala. 571, 44 So. 642, 13 L. R. A. (N. S.) 156, 15 Ann. Cas. 237; *James* v. *Burchell*, 82 N. Y. 109.

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But we do not construe the bill in this case to be an effort on the part of the vendors to evade any responsibility imposed upon them by their contract. They state in their bill that they have at all times been ready, willing, able and anxious to comply with the terms of their agreement, and that the Power City Investment Company, which is a mere holding company for the complainants, is ready, willing, able and anxious to convey the land to the appellants upon their compliance with the terms of their contract; and the bill contains the usual prayer for general relief. It was entirely competent for the court, with all of the parties before it, and in pursuance of the prayer for general relief, to have required the vendors to unite with the Power City Investment Company in a deed conveying the land to the appellants with covenants of general warranty of title. This would have given the appellants more than they claimed in their letter of June 12, 1916, and all they could have claimed even if the waiver contained in said letter were not binding on account of a failure to accept its terms, or the lack of consideration; and this we think the trial court should have done.

Since the appeal in this case was allowed, all of the purchase money for the land has become due, which will necessitate some changes in the decree appealed from. The case will, therefore, be remanded to the circuit court, with directions to amend its former decree by requiring the appellees, E. P. Jackson and H. P. Hammond, and the Power City Investment Company to execute, acknowledge and in all respects make ready for recordation, and file amongst the papers in the cause a deed, with covenants of general warranty on the part of Jackson and Hammond, conveying to the appellants the tract of thirty-five acres of land in the proceedings mentioned by the description given in their option contract, with liberty to the appellants to withdraw the same upon payment of the balance of the purchase

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money therefor, giving the vendors the right to collect the money which was deposited in the Bank of Williamsburg, and rendering a personal decree against the appellants for the balance of the purchase money due by them and the costs of the suit, and decreeing a sale of the land in case of default in the payment of such personal decree within such reasonable time as it may prescribe. The decree of the circuit court, as thus amended, will be affirmed.

Amended and affirmed.

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Wytheville.

HOUSTON'S ADM'X v. SEABOARD AIR LINE RAILWAY.

June 18, 1918.

1. RAILROADS—*Master and Servant—Rules—Construction.*—A railroad company had printed rules for the guidance of its employees, among them the following: "Engines will have steam blowed off and blowers provided when possible to do so before a boiler-maker will be required to work in a fire-box. Tanks will be cleaned out before boiler-makers will be required to work inside of them."

   Held: That the rule had no application to oil tank cars. The context of the rule would seem to indicate that the rule was restricted to the engine tender tanks of locomotives, and that it was so restricted was stated to have been well understood by the employees of the company, which statement was not denied by any evidence in the instant case.

2. MASTER AND SERVANT—*Safe Place to Work.*—The rule that it is the duty of the master to use ordinary care to provide a reasonably safe place in which the servant is to work does not generally apply where the servant is sent to make repairs in order to render the place safe.

3. MASTER AND SERVANT—*Negligence of Master—Case at Bar.*—In the instant case the foreman of defendant went with plaintiff's intestate, an experienced boiler-maker, to a car, described in the evidence as a Texas oil tank car, and pointed out to him the tank and instructed him to rivet a grab-iron on the end of the tank. Intestate well knew that the work to be done by him could only be done by going, orvsending his helper, into the tank. Lying alongside of the tank was a line of hose charged with compressed air and connected with a compresaed air machine, and readily available to blow out the tank, if necessary. Intestate, however, did not blow out the tank. The company knew nothing of the contents of the tank.

   Held: That defendant company was not guilty of actionable negligence, where intestate was killed by an explosion of gas in the tank caused by the dropping of a heated rivet into the tank, as requested by him. It was not the duty of the company, under the circumstances, to send another employee to blow out the tank, which the intestate could do as well as any other.

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Syllabus.

4. MASTER AND SERVANT—*Assumption of Risk—Contributory Negligence.*—Assumption of risk is a matter of contract, while contributory negligence is a matter of conduct. This distinction, however, has not always been observed in the application of the law to the facts of particular cases.

5. MASTER AND SERVANT—*Assumption of Risk.*—By the contract of service, the servant impliedly assumes the risk of all dangers that are naturally and normally incident to that service, and not due to the master's negligence. The servant also assumes, by his contract of service, the dangers thereafter arising in the course of his employment which become known to him, or which by the exercise of ordinary care on his part ought to become known to him including, of course, all open and obvious dangers.

6. MASTER AND SERVANT—*Assumption of Risk.*—As to dangers arising after entering into the contract of service, it is the duty of the servant to bring them to the attention of the master and ask their removal, and if the master refuses to remove them, the servant should quit the service; but if he fails to notify the master, and continues in the service when he knows or ought to know of the danger, he thereby assumes the risk. It is a part of his contract of service that he will thus assume such risks. He impliedly agrees at the time of entering into the contract of service that, as to such dangers, he will either report them and have them remedied, or else will assume the risk of them, if he continues in the service. As to this class of dangers, the rule is the same whether the master be guilty of negligence or not.

7. MASTER AND SERVANT—*Assumption of Risk.*—In order to charge the servant, however, with the assumption of the risk of dangers, they must be so patent as to be instantly recognized by persons familiar with the business and accustomed to the service. The particular injury sustained need not have been apprehended nor the danger thereof fully realized, but the servant must know and appreciate the fact that the service in which he is about to engage involves the risk of danger to him, or be chargeable with such knowledge, before he can be held to have assumed it.

8. MASTER AND SERVANT—*Assumption of Risk—Knowledge of Servant.*—If the servant has full knowledge of all the physical conditions, he is chargeable with knowledge of all the resulting dangers proximately resulting therefrom which would be obvious to a man of ordinary care and prudence. He need not have had in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury.

9. MASTER AND SERVANT—*Assumption of Risk—Knowledge of Ser-*

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vant.—The general rule is well settled that where the master and servant are possessed of equal knowledge, or means of knowledge, of defects or dangers, or where they are equally ignorant thereof, the servant assumes the risk; and the same is true *a fortiori* where the servant has better means of knowledge than the master. But if the master knows, or is under an obligation to know, of dangers of which the servant is ignorant, and of which he is not under an equal obligation to know, there is no assumption of risk.

10. MASTER AND SERVANT—*Assumption of Risk—Case at Bar.*—Plaintiff's intestate, an experienced boiler-maker, was directed to make repairs in an oil tank car. He found the tank car closed when he came to do his work. He knew that it had not been ventilated, but took no steps to ventilate it, though the facilities therefor were readily at hand. He also knew from the experience of others that it was not safe to enter it. At least two persons reported a very strong and pungent odor in the car, and while he did not know what had been transported in the car, yet the character of the car itself was an advertisement to him of what had probably been transported in it—that is, either oil, gasoline or something of that kind. He was chargeable with notice of the fact, which is common knowledge, that if oil is left in a car of this kind, tightly closed, gases are likely to arise, and that such gases are inflammable. His own senses must have informed him of the presence of gas in the car, and while the witnesses testified that they did not know the nature of the gases, or that they were inflammable, still he was chargeable with knowledge of facts sufficient to show that it was dangerous to bring fire into contact with the contents of the car. This danger was patent, open and obvious, and when he directed a red hot rivet to be dropped into the tank, he assumed the risk of the consequences.

Error to a judgment of the Circuit Court of Norfolk county, in an action of trespass on the case. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

Hicks, Morris, Garnett & Tunstall, for the plaintiff in error.

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Goodrich Hatton, for the defendant in error.

BURKS, J., delivered the opinion of the court.

This is an action under the federal employers' liability act (act April 22, 1908, chapter 149, 35 Stat. 65 [U. S. Comp. St. 1916, sections 8657-8665]) to recover for the death of the plaintiff's intestate caused by the alleged negligence of the defendant. The negligence charged was the failure of the defendant to use ordinary care to provide a reasonably safe place in which the plaintiff's intestate was to work. There have been three trials of the case. On the first trial, there was a verdict for the plaintiff for $5,000, which the trial court set aside because it had admitted immaterial evidence, and further because the plaintiff's intestate assumed the risk of the injury from which he died. At the second trial, there was a judgment for the plaintiff for $6,000 which the trial court also set aside on the ground that the plaintiff's intestate assumed the risk of the injury from which he died. On the third trial the defendant demurred to the evidence and the jury rendered a verdict for the plaintiff for $7,500, subject to the opinion of the court on the demurrer to the evidence. The trial court sustained the demurrer, and to its judgment this writ of error was awarded.

The evidence on the first and second trials is not certified, so that it does not appear whether or not the evidence on the last trial was substantially the same as that on either of the other trials.

The facts in the last trial, viewed from the standpoint of the demurrer to the evidence, are substantially as follows: There was placed on the repair tracks of the defendant on March 23, 1914, a Texas oil tank car. Among other repairs required to be made to the car, it was necessary to rivet a grab-iron on the end of the tank. Work of this kind

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was seldom required; this car being tne second of the kind needing repairs in a period of twelve or fourteen years. On the morning of March 24, 1914, the foreman of boiler-makers of the company directed John T. Houston, an experienced boiler-maker, who had been in its employment intermittently for a period of fourteen years, to rivet the grab-iron on the car. Houston, with his helper, a boy sixteen years of age, proceeded to the car, which, as stated, was on one of the repair tracks. He found two other workmen of the defendant present making other repairs on the car. The tank was mounted on trucks, was thirty feet long, seven feet in diameter, and circular in shape. In the center of the tank and on top of it there was a dome projecting up twenty-eight inches, and at the top of this dome was a manhole twenty-two inches in diameter. The tank was loaded through this manhole and no light could penetrate the tank, except through the manhole. The repairs to be made by Houston consisted in putting two rivets through a grab-iron on the end of the tank. In order to do this work, it was necessary to place the grab-iron in position and fasten it with temporary bolts running through the holes in which the permanent rivets were to be driven. The grab-iron was held in place by these bolts. One bolt would be taken out and a rivet inserted in its place and driven up and made secure. Then the same operation would take place with the other bolt and rivet. The rivets might be either inserted from the inside and driven or hammered down on the outside, or they might be inserted from the outside and driven or hammered down on the inside. In either of these cases, it was necessary first to heat the rivets red hot. When Houston and his assistant arrived at the car, they took the top off the manhole. A ladder was then placed inside of the tank and Houston sent his helper, Wallace Elliott, down into the tank to insert the bolts in the grab-iron so as to hold it in place until the rivets were inserted.

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Elliott was in the tank from a minute to a minute and a half, and came out of the manhole with his eyes streaming with water and said to Houston that the gas was too strong for him, and he could not stand it. One of the other workmen who was then present, P. C. Jones, went half way down the ladder into the tank car to insert and hold the rivet, but would go no further and came up and said that it smelled so strong in there that "he had no business in there." Another one of the workmen who was present went to the manhole and leaned over it, but did not go in. Houston then said that he would go in and hold the bolt himself, and asked one of the other workmen to drive the rivet for him on the outside. There was a portable forge alongside the car, and Houston requested one of the workmen to heat the rivet and pass it to Elliott, and told Elliott to drop it down to him in the tank, and that he would insert it. Houston went into the tank, and the rivet was heated, as directed by him, and Elliott dropped it through the manhole, as requested, and almost immediately there was one explosion followed by another, and the tank was in a blaze, and Houston was burned so badly that he died shortly after being taken out of the tank. None of the witnesses knew the nature of the gas in the tank, or expected any explosion to take place when the red hot rivet was dropped in. All testified that there was a very strong odor, but the nature of it they could not describe. One of them stated that it was more stifling than anything else, and made his eyes run water. Nor did any of them know what had been the contents of the tank, though after the accident some little oil was found around the valve in the bottom of the tank. Alongside of the tank car and in good working condition was a line of hose charged with compressed air and connected with the compressed air machine, which was available to blow out the tank if desired. The railroad company had printed rules for the guidance of its employees, and

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among them was Rule 52, which is as follows: "Engines will have steam blowed off and blowers provided when possible to do so before a boiler-maker will be required to work in a fire box. Tanks will be cleaned out before boiler-makers will be required to work inside of them." There was no other printed rule on this subject, but it appeared from the evidence on behalf of the defendant, which was not contradicted, that the latter part of this rule was made and had reference only to tanks of locomotive tenders, and it was well understood by the workmen that it applied only to such tanks and that it was the duty of the boiler-maker, or the repairer, if he desired the tank to be cleaned out before working in it, to report the fact to the foreman, so that he might have it cleaned out. It was not necessary to clean all tanks, but only those found to be dirty.

The defendant demurred to the evidence on three grounds: (1) That the defendant was not negligent; (2) that the death of the plaintiff's intestate was not proximately caused by any act or omission on the part of the defendant; and (3) that the plaintiff's intestate assumed the risk of going into the tank and ordering the hot rivet to be thrown in to him. The trial court seems to have rested its conclusion on the ground last stated.

We are of opinion that Rule 52, mentioned above, has no application to oil tank cars such as was used in this case. The context of the rule would seem to indicate that the rule was restricted to the engine tender tanks of locomotives, and that it was so restricted is stated to have been well understood among employees of the company, which statement is not denied by any evidence on behalf of the plaintiff. But even if the rule was applicable to oil tank cars, used in interstate commerce, the undisputed testimony shows that if a boiler-maker desired a tank car cleaned out before using it, it was his duty to notify his superior and have it cleaned out, but no such notice was given in the instant case.

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We have been unable to discover from the evidence any actionable negligence on behalf of the defendant. The rule that it is the duty of the master to use ordinary care to provide a reasonably safe place in which the servant is to work does not generally apply where the servant is sent to make repairs in order to render the place safe. In the instant case, the defendant had no knowledge of the danger which resulted in the death of the plaintiff's intestate. The foreman of the defendant went with the intestate to the car, which was spoken of in the evidence as a Texas oil tank car, and pointed out to him the tank and instructed him to rivet a grab-iron on the end of the tank. The intestate was an experienced boiler-maker, and he well knew (indeed it was a patent fact) that the work to be done by him could only be done by going, or sending his helper, into the tank. There was no means of access to the inside of the tank except through the manhole on top. This he found fastened down. Lying alongside of this tank was a line of hose charged with compressed air and connected with the compressed air machine, and readily available to blow out the tank, if necessary. When he opened the manhole, if it was not safe to enter the tank, he had but to use the instrumentality provided by the company to render the inside of the tank entirely safe. It was not the duty of the company, under the circumstances, to send another employee to blow out the tank, which the intestate could do as well as any other. The company knew that he was an experienced boiler-maker, and that he was as competent to discharge this duty as any other servant it could send. He was sent to repair a tank which had only the day before been placed on the repair track. The company knew nothing of the contents of the tank, but both he and the company knew that in order to make these repairs it would be necessary for him to go inside the tank. No notice of this fact was necessary. It was his duty to inspect for himself the

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place where he was to work. He was sent to make repairs. He was furnished with all the appliances necessary to do the work, and we are unable to see that the defendant failed to discharge any duty which it owed to plaintiff's intestate.

But aside from this, if it be conceded that the defendant was negligent, the plaintiff's intestate assumed the risk which resulted in his death. It has been repeatedly held by this and other courts that assumption of risk is a matter of contract, and that contributory negligence is a matter of conduct. *Ches. & Ohio Ry. Co.* v. *Meadows,* 119 Va. 57, 89 S. E. 244, and cases cited. But the distinction has not always been observed in the application of the law to the facts of particular cases. By the contract of service, the servant impliedly assumes the risk of all dangers that are naturally and normally incident to that service, and not due to the master's negligence. *Gila Valley R. Co.* v. *Hall,* 232 U. S. 101, 34 Sup. Ct. 229, 58 L. Ed. 521. The servant also assumes, by his contract of service, the dangers thereafter arising in the course of his employment which become known to him, or which by the exercise of ordinary care on his part ought to become known to him, including, of course, all open and obvious dangers. As to such dangers arising after entering into the contract of service, it is the duty of the servant to bring them to the attention of the master and ask their removal, and if the master refuses to remove them, the servant should quit the service; but if he fails to notify the master, and continues in the service when he knows or ought to know of the danger, he thereby assumes the risk. It is a part of his contract of service that he will thus assume such risks. He impliedly agrees at the time of entering into the contract of service that, as to such dangers, he will either report them and have them remedied, or else will assume the risk of them, if he continues in the service. As to this class of dangers, the rule is the same whether the master be guilty of negligence or

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not. In order to charge the servant, however, with the assumption of the risk of dangers of this nature, the must be so patent as to be instatnly recognized by persons familiar with the business and accustomed to the service. The particular injury sustained need not have been apprehended nor the danger thereof fully realized, but the servant must know and appreciate the fact that the service in which he is about to engage involves the risk of danger to him, or be chargeable with such knowledge, before he can be held to have assumed it. If the servant understood, or ought to have understood, that the existence of certain abnormal conditions exposed him to the risk of injury, he cannot recover damages for an injury actually received, although he did not fully realize the extent or character of the injury which might be sustained, or did not appreciate every particular of the risk, or all the possible consequences thereof. If he knows of the physical conditions, it is not necessary that he should be conscious of, or have in mind, a particular danger. If the danger might reasonably have been apprehended by a person of ordinary care and prudence, with full knowledge of the facts, it is enough that he knows, or is chargeable with knowing, that the particular act he is about to perform involves the risk of personal injury to himself. *Feely* v. *Pearson Cordage Co.*, 161 Mass. 426, 37 N. E. 368; *L. & N. R. Co.* v. *Kemper*, 147 Ind. 561, 47 N. E. 214; *Fontaine* v. *Johnson Lumber Co.*, 76 N. H. 163, 80 Atl. 338; *Smith* v. *United Lumber Co.*, 71 W. Va. 749, 77 S. E. 330; *Southern Ry. Co.* v. *Mauzy*, 98 Va. 692, 37 S. E. 285; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970; 26 Cyc., p. 1202; 3 Labatt M. & S. (2d ed.) pp. 3170, 3217, and cases cited; Note, 38 C. C. A. 314.

Counsel for the plaintiff in error insist that "unless Houston knew of the danger of explosion, he did not assume the risk." We cannot assent to this proposition. Even if it were necessary that the particular danger (an explosion)

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should have been apprehended, Houston would have been held to have assumed the risk, not only if he *knew*, but if, in the exercise of ordinary care, *he ought to have known of the danger of an explosion.* The facts of the following cases cited for the plaintiff in error are so entirely different from those in the instant case that we do not regard them as in point: *Woodruff* v. *Yazoo, etc., R. Co.*, 127 C. C. A. 411, 210 Fed. 849; *Kirbe* v. *Southern Ry. Co.*, 16 Ga. App. 49, 84 S. E. 491; *St. Louis, etc., R. Co.* v. *Conley*, 110 C. C. A. 97, 187 Fed. 949.

Many cases, of the highest authority, hold that the mere knowledge of defects of machinery or place of work, without knowledge and appreciation of the fact that they occasion danger to the servant in the discharge of his duties, will not defeat a recovery against the master, unless the danger is so obvious as to charge the servant with knowledge thereof (see cases cited in 26 Cyc. 1201-2); but we do not understand them as conflicting with the views hereinbefore expressed. If the servant has full knowledge of all the physical conditions, he is chargeable with knowledge of all the resulting dangers proximately resulting therefrom which would be obvious to a man of ordinary care and prudence. He need not have had in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury.

Furthermore, as to dangers arising during the course of the employment, and of which the master and servant are equally ignorant, the law is well stated and the authorities therefor cited in 26 Cyc. 1202-3, as follows: "The general rule is well settled that where the master and servant are possessed of equal knowledge, or means of knowledge, of defects or dangers, or where they are equally ignorant thereof, the servant assumes the risk; and the same is true *a fortiori* where the servant has better means of knowledge than the master. But if the master knows, or is under an

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obligation to know, of dangers of which the servant is ignorant, and of which he is not under an equal obligation to know, there is no assumption of risk." In the instant case, the servant certainly had at least equal knowledge with the master of the condition of the car to be repaired. In *Chesapeake & Ohio Ry. Co.* v. *Sparrow's Adm'r*, 98 Va. 630, 644, 37 S. E. 302, it was held, "that a servant who knows the unsafe condition of the place in which he is working, or of the machinery, materials or appliances he is using, is not compelled to continue the work, but if he does continue it, without exercising ordinary prudence and care for his own safety, he must be held to have assumed, not only the risks ordinarily incident to the service when he entered upon it, but such as become known to him during the progress of the work, or which were readily discernible to a person of his age and capacity in the exercise of ordinary care." This statement of the law is fully sustained by the cases cited in support of it, and we have no disposition to depart from it.

No one can read the recital of facts hereinbefore given without anticipating the results which actually followed. The intestate's helper first went into the tank to insert the bolts. He was in the tank from one minute to a minute and a half, and came out with his eyes steaming with water, and stated that the gas was so strong in the tank that he could not stand it any longer, and that he believed if he had stayed there a minute longer he would not have been able to have gotten out. Another workman who was present got only half way down the ladder into the tank before he came back and said that it was too strong for him, and still a third workman leaned over the manhole and also found that the odor was very strong. In the face of these facts the intestate declared his purpose to go into the tank himself and insert the red hot rivets, and directed a rivet to be heated red hot and dropped in the tank to him. The

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intestate was an experienced boiler-maker. The tank on which he was to make repairs was an oil tank car. He found it closed when he came to do his work. He knew that it had not been ventilated, but took no steps to ventilate it, though the facilities therefor were readily at hand. He also knew from the experience of others that it was not safe to enter it. At least two persons reported a very strong and pungent odor in the car, and while it does not appear what had been transported in the car, yet the character of the car itself was an advertisement to him of what had probably been transported in it—that is, either oil, gasolene, or something of the kind. He is chargeable with notice of the fact, which is common knowledge, that if oil is left in a car of this kind, tightly closed, gases are likely to arise, and that such gases are inflammable. His own senses must have informed him of the presence of gas in the car, and while the witnesses testify that they did not know the nature of the gases, or that they were inflammable, still he is chargeable with knowledge of facts sufficient to show that it was dangerous to bring fire into contact with the contents of the car. This danger was patent, open and obvious, and when he directed a red hot rivet to be dropped into the tank, he assumed the risk of the consequences.

It is true that those present and assisting in heating the rivet and dropping it into the tank testify that they did not think there would be an explosion, and from this it is argued that the danger could not have been so patent as to charge the intestate with the assumption of the risk thereof (citing *Choctow, etc., R. Co.* v. *Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 838, and note 7 Ann. Cas. 430), but the fact is they do not appear to have done any thinking at all. With this knowledge of the conditions in the tank, they saw the intestate enter the tank that two of their number would not stay in, without a word of remonstrance,

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or even a suggestion of danger; and doubtless if they had been asked if they thought there was any danger from gas. they would have answered that question also in the negative. We cannot attach grave importance to thinking of that kind. "The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, he alone must suffer the consequences, and he is not excused when he fails to discover danger, if he made no attempt to employ the facilities nature has given him." *Day* v. *Cleveland, etc., R. Co.*, 137 Ind. 210, 36 N. E. 854.

For these reasons, we are of opinion that there was no error in the judgment of the court below, and the same will be affirmed.

Affirmed.

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Syllabus.

Staunton.

ADAMS V. HAZEN AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. SPECIFIC PERFORMANCE—*What Contracts will be Enforced.*—Where the contract is in writing it must contain all the essential elements of a valid executory contract—that is to say, competent parties, a legal subject matter, a valuable consideration and mutual assent—before it will be enforced in equity.
2. SPECIFIC PERFORMANCE—*Formal Contract to be Prepared.*—If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. And if, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.
3. SPECIFIC PERFORMANCE—*Discretion of Court.*—Every application for the specific performance of a contract is addressed to the sound discretion of the court, regulated by established principles.
4. SPECIFIC PERFORMANCE—*Contract—Proof—Terms.*—The contract must be distinctly proven, and its terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirous, prompt and eager.
5. SPECIFIC PERFORMANCE—*Formal Papers to be Prepared—Case at Bar.*—A contract for the sale of timber contained the following provision: "Terms of sale half cash when transfer papers are properly gotten up, and remainder to be settled by note payable six months from date."

   Held: That, construing this clause, along with the whole instrument, its language was not ambiguous and plainly referred only to such formal papers as were necessary to carry the

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contract into effect. The further papers to be executed by the parties were not to be of an *executory* character, in so far as the contract in question was concerned, but were to consummate and carry into effect, that contract—to execute that contract, to the extent of making a "transfer" or conveyance to the vendee in accordance with his rights under such contract. The contract was, therefore, not such an incomplete and tentative contract as a court of equity would decline to specifically execute.

6. SPECIFIC PERFORMANCE—*Intention—Meeting of Minds—Construction of Contract.*—A written contract for the sale of "all merchantable timber" upon a certain tract of land is in itself conclusive that there was a meeting of the minds of all the parties thereto in its use of the words "all merchantable timber" as descriptive of the timber sold and purchased. What may be the proper construction of that language is a wholly different matter. If it has a certain and definite meaning, which may be ascertained by established methods of construction of the provisions of contracts, that is sufficient, in so far as the validity of the contract in that particular is concerned. These questions of construction arise in a majority of cases that come before the courts for the interpretation and enforcement of contracts, but are never considered as grounds for cancelling the instrument.

7. TREES AND TIMBER—*Merchantable Timber.*—In a contract for the sale of "all merchantable timber" upon a certain tract of land, "merchantable timber" is all timber—whatever its size—that had, at the date of the contract, or may have during the life of the contract, a commercial value in that locality, for the purpose of manufacture into lumber, or for any other purpose. Hence the term "merchantable" used in such contract is one that the law can define, and the contract in that behalf has "a legal subject matter."

8. TREES AND TIMBER—*Time for Removal of Timber—Specific Performance.*—It is well settled that where no time for the removal of timber is specified in timber contracts, the contracts will be construed as providing, by implication, for "a reasonable time" for such removal. A contract, therefore, for the sale of timber, which does not fix any time for the removal of the timber, is not incomplete, nor unenforceable, because of this omission.

9. TREES AND TIMBER—*Sale of Timber—Interest on Deferred Payments.*—The contract in the instant case provided that the note for the deferred purchase money should be made payable six months from date, *i. e.*, six months from the date of said contract of March 14, 1917, *i. e.*, it was to be made payable September 14, 1917. Had the note been executed in accordance

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with such contract it would have borne no interest unless and until default had been made in its payment on its due date, September 14, 1917.

10. VENDOR AND PURCHASER—*Payment—Transfer Papers.*—A sale of timber provided for one-half cash payment "when transfer papers are properly gotten up."

Held: That a reasonable construction of the words "transfer papers properly gotten up" is that a conveyance in writing, properly acknowledged for recordation according to law, was within the contemplation of the parties.

Appeal from a decree of the Circuit Court of Lee county. Decree for defendants. Complainant appeals.

Reversed.

The bill of the appellant in this cause (complainant in the court below), seeks to compel the specific performance of an agreement in writing executed by both the appellant and appellee (defendant in the court below), which is in the words and figures following:

"This agreement, made and entered into this the 14th day of March, 1917, by and between T. T. Adams and R. S. Hazen, trustee.

"Witnesseth: For and in consideration of one dollar cash in hand, the receipt of which is hereby acknowledged, and other considerations hereinafter mentioned, said R. S. Hazen, trustee, agrees to sell to T. T. Adams for a consideration of six thousand five hundred dollars all the merchantable timber on that portion of the Herndon tract of land lying in Lee county, Va., said portion described as follows: All the merchantable timber on that portion of said tract lying south of the creek paralleling the Virginia and South Western Railway and all the merchantable timber with the exception of the oak on that portion of said tract lying north of the creek paralleling the Virginia and South Western Railway including the water shed on north side of said creek extending to the top of the ridge or chain of mountains as they meander.

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"Terms of sale half cash when transfer papers are properly gotten up and the remainder to be settled by note payable six months from date. It is further agreed that said Adams shall have without costs to him all right of ways over any part of the above described land in removing this timber as well as free use of land that might be required for mill sites for milling the timber and sidetracts on land. Said Adams can also mine from this property what coal he required to run his machinery while operating his timber at a cost to him of twenty-five cents per ton in excess of ten cars of forty tons each, said ten cars to be donated to the said Adams.

(Signed) "T. T. ADAMS,
(Signed) "R. S. HAZEN, Trustee."

The bill alleges that the land, on which the timber covered by said writing and also certain coal were located, was owned at the time such writing was executed by the defendant "as trustee for himself and other parties: that while the owners desired to sell both the coal and timber, they finally consented to dispose of the timber apart from the coal, and left the matter entirely in the hands of said defendant to handle as he saw fit;" and quotes from a letter from defendant to complainant, of date January 23, 1917, in which defendant says: " * * * Now that I have gotten the owners of this property to agree with my idea about selling the timber, I see no reason why you and I should not be able to make a satisfactory deal with one another."

The bill contains the following other quotations from correspondence between the complainant and defendant prior to March 14, 1917, on which date the agreement in writing aforesaid was executed, and makes the following allegations in that connection, viz:

"On February 2, 1917, defendant again wrote to complainant as follows:

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" 'It is not possible for me to give you an opinion in regard to the value of the timber in question, for I have never been over that tract of land, and even though I had my practical knowledge of this character of business is not sufficient to enable me to form a correct conclusion as to its worth.

" 'I was offered sometime since $3,500.00 for all the merchantable timber on this tract of land, and the owners of the property refused to consider it. I have also been offered $3.50 per thousand for the hemlock and chestnut; $5.00 for white oak, and $6.00 for yellow oak; $8.00 to $10.00 for poplar on the stump. Now, of course I do not know for the reasons stated above, whether or not these are reasonable offers, neither have I been able to ascertain the reliability of the parties making the offer.

" 'What I want you to do is to look over the property and make me the best offer you possibly can for I feel that you can afford to give as much as anyone, and I can place confidence in your report. Some of this timber has been damaged by fires, but to what extent I do not know.'

"In reply to this letter complainant wrote:

" 'I note that you state that sometime since, you were offered $3,500.00 for all the merchantable timber on this tract; and just right here, if you will allow me to make you a suggestion, I will say, that I would not sell all of the merchantable timber on the tract, from the fact that mine props are merchantable timber, and the party working the coal on your property could use the mine props to advantage. In my judgment, it would be to your interest to sell the timber running from ten inches to eleven inches and over in size, stump high. Such timber would be too large for mine props, and would really be of no benefit to anyone mining coal, whereas if this timber remains as it is, it is liable to be damaged considerably, or its value largely diminished, in consequence of the forest fires in that section

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every fall and spring. I mention this, since I wish to say to you that I will examine the timber on the property and make you a proposition for it, of so much money for the timber running say ten inches in diameter three feet above the ground.

" 'It is my intention to examine this property somewhere between the 20th of this month and the first of March, if I can conveniently make arrangements to do so.'

"After this correspondence, complainant made a personal examination of the timber, and on March 14, 1917, the following contract in writing was made between him and the defendant."

(Here the bill contains a copy of the writing above given.)

The bill thereupon contains the following allegations with respect to what occurred touching said agreement after it was executed as aforesaid, viz:

"Second: On March 26, 1917, the defendant wrote complainant as follows, from Knoxville, Tenn., where he lives and is engaged in business:

" 'I have been very busy since you were here, and my attorney being out of the city, I have not had an opportunity of having our contract written up, but will have it attended to within the next few days and forward it to you.

" 'I find out that I sold you the merchantable timber in question a little too cheap, but I trust the good trade you made will encourage you to assist me in disposing of the coal property.'

"Complainant replied to this letter on March 28, 1917, as follows:

" 'I note that you have been very busy since I saw you last, and that your attorney has been out of the city, and you have not had opportunity to have contract written up, I will say you need not inconvenience yourself in any way about this matter. I would like to have the business closed

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up at any time it suits you. I suppose you have abstract of title of this property, and I would like to look over this and would thank you to send it to me.'

"On March 28, 1917, defendant wrote complainant as follows:

" 'I herewith enclose contract and note. I trust the contract as drawn by my attorney will meet with your hearty approval.

" 'It has always been my understanding, and I have been informed by several timber men in and around Pennington Gap, Va., that the term "merchantable timber" means all timber measuring fourteen inches, and upward, in diameter two feet from the ground, which can be sawed up into some merchantable lumber.

" 'Nothing was said in regard to the length of time you were to have in which to remove the timber, and my attorney stated it was very essential for this to be stated clearly in the contract, and I assumed it would take you probably twelve months to remove the timber, and instructed him to make the time eighteen months, as I am anxious to give you all the time required without putting you to any great amount of inconvenience.

" 'You can sign copy of contract and return to me, with check for $3,250.00, also note for like amount due six months after date, with interest.

" 'The more information I get on the amount of timber on the boundary included in your contract, the more fully convinced I am of the big bargain I gave you. I hope you will make enough money out of this trade to organize a big mining company and let me lease you my coal land at a reasonable royalty.'

"Third: Complainant shows unto your honor that the communication last mentioned from defendant was a great surprise to him, in that it sought to change the written contract between them in two important particulars:

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"(1) In substituting for the term 'merchantable timber' the words 'all timber measuring fourteen inches, and upward, in diameter two feet from the ground, which can be sawed up into sound merchantable lumber.'

"(2) In endeavoring to limit the time within which the timber should be removed, to eighteen months—there being no limit to such time in the written contract. Complainant shows unto your honor that, when any time is specified in such contracts, it is usual among purchasers of timber to stipulate at least five years for the removal thereof; and he is advised that where no time is specified, 'a reasonable time,' to be determined by all the evidence in the case, is allowed by law for the performance of the contract.

"Fourth: Complainant shows unto your honor that, because the contract sent to him by the defendant varied from the contract of March 14, 1917, in the same important particulars mentioned above, he declined to sign the same, and on April 13, 1917, mailed to defendant a formal contract in duplicate, duly signed and acknowledged by him for record, imbodying the precise terms of said contract of March 14, 1917. This contract defendant was requested to execute as trustee, and also to have the same signed, but not acknowledged, by all parties for whom he was such trustee, in order to show of record their approval of sale. Defendant was requested after the execution of said contract as aforesaid, to attach a draft for $3,250.00 to the same and forward it, through his bank, to complainant that being the cash payment provided for by said contract of March 14, 1917; and to send instructions with said contract and draft allowing complainant to examine the instrument before honoring the draft, but not to remove it from custody of the bank until the draft had been paid; and complainant added in his letter to defendant on this subject:

" 'Then I would promptly forward to you by mail my six months' note for $3,250.00, or if this mode of cash payment

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and mailing you note is not satisfactory, I will be glad to adopt any plan or suggestion you may have to make.'

"But as complainant shows unto your honor, the defendant declined to execute said contract and wrote to complainant on April 17, 1917, asking for his understanding of the phrase 'merchantable timber.'

"On April 25, 1917, complainant wrote defendant as follows:

" 'I have your favor of the 17th inst., and note you wish to know what my understanding is with reference to the phrase "merchantable timber."

" 'I will say that merchantable timber means all timber that can be sold. Any timber that cannot be sold, naturally is not merchantable. There was a case of this sort brought up in the courts in Tazewell county, Va., and the courts held that any timber on the property that could be sold was merchantable, and that portion, if any, that could not be sold naturally was not merchantable. It has always been my understanding that merchantable timber means exactly what it says, and I do not see how any other construction could be put upon it. As I understand it, all timber that is salable and can be sold is merchantable; otherwise it is not merchantable.

" 'I virtually stated this to you in my letter of February 6th, before I had ever gone over the property to investigate the timber. By referring to that letter, you will notice I stated in the first paragraph as follows:

" 'I will say that I would not sell all of the merchantable timber on the tract, from the fact that mine props are merchantable timber, and the party working the coal on your properties could use the mine props to advantage."

" 'Now before going to investigate this timber, my idea was to make you an offer on it running ten inches and over in size, but after going there and examining the properties, I saw that you would have plenty of timber on that portion

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of the property that I would not be interested in, for mining purposes; and again, upon examining the hemlock I noticed that it was straight and the trees could be worked to a very small size in making framing. Therefore, I decided after this examination, on going to see you that I would make a proposition covering the merchantable timber on that portion of the property that I would like to buy, which I did. No doubt, you will recall the conversation I had with you the morning I arrived in Knoxville, when I stated in your office that some of the hemlock timber could be worked as low as six inches in size.

" 'I merely mention these facts now to show you that it was certainly not my intention to take any undue advantage in any way, so far as using terms in connection with timber with which you were familiar, was concerned, and I certainly tried to make myself clear to you about these matters.

" 'With reference to the time of removal I am not able to say how long a time I would want with reference to taking the timber from the property. It might be that war conditions will affect the market price of lumber either favorably or very unfavorably, and I would not want to be bound under any stipulated time for removal. It would of course naturally be to my interest to remove it as soon as I could do so to advantage myself, since it does not pay me anything standing there, with interest on the investment accruing.

" 'As stated in my letter of the 13th inst.—The contract in duplicate I enclosed to you carried out the literal informal agreement in writing signed by you as trustee, as well as myself, on March 14, 1917. That agreement is binding on both parties, and certainly could not be altered without mutual consent. Now, so far as I am concerned, I do not want this contract of sale altered in any way. I trust now that I have made myself entirely clear to you; otherwise, shall be glad to hear from you further about these matters.'

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"On May 7, 1917, defendant wrote complainant as follows:

" 'Mr. T. T. Adams,
Richmond, Va.

" 'Friend Tom:

" 'I laid your last letter before the owners of the timber in question and they all stated that their understanding of the term "merchantable timber" meant all timber measuring fourteen inches in diameter and upward, two feet from the ground that could be sawed into sound, merchantable lumber.

" 'They also stated that they *left* the length of time I agreed to give you to remove the timber was reasonable and would be so construed.

" 'I regret this misunderstanding, and I feel that you are just as sincere in your understanding of the term as we are, but while this may be true, it will not be possible for us to arrive at any definite conclusion in this matter, unless we can affect amicably a compromise.

" 'There are several parties who wish to buy this timber, and if you are not willing to change your views in regard to the terms in question, I will then have to ask you to cancel the contract.

" 'Now Tom, if you feel that you have just grounds for bringing suit against me, as trustee, for breach of contract, you must not allow our personal and social relations to interfere with your making an honest effort to protect your own interests.'

"In consequence of this letter, complainant has felt compelled, much to his regret, to bring this suit for the protection of his interests. For complainant is advised and charges that the contract in writing of March 14, 1917, between him and the defendant is a valid contract, binding on the defendant and all those represented by him as trus-

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tee, which a court of equity will not permit to be altered without his consent, but will require to be specifically executed by the parties; that the phrase 'merchantable timber' used therein means all timber that is or can be made an article of merchandise; and that the words 'merchantable timber' in said contract cannot be substituted by the words 'all timber measuring fourteen inches and upwards two feet from the ground, that could be sawed into "merchantable timber" ' without complainant's consent; that as no time was specified in said contract of March 14, 1917, for the removal of the timber, defendant cannot require complainant to limit the time for removal of said timber to eighteen months by inserting such limit in the contract, but that the complainant must be allowed a 'reasonable time' under all the circumstances of the case for such removal.

"Complainant further shows unto your honor that he is not advised who are the precise persons represented by R. S. Hazen, trustee, in said contract of March 14, 1917.

"Complainant further shows unto your honor that he is, and has always been ready, anxious and willing to perform all the obligations resting on him under said contract of March 14, 1917, and especially to pay the purchase price for the merchantable timber mentioned therein in the manner required by said contract; that nothing was said in said contract about interest on the six months' note provided for therein; that the note sent to complainant by said R. S. Hazen for his signature likewise demanded no interest and was as follows:

" 'Knoxville, Tenn., March 14, 1917.

" 'On or before,

" 'Six months after date I promise to pay to the order of R. S. Hazen, trustee, thirty-two hundred and fifty and no/100 dollars, for value received, payable at the office of Hazen, Trent & Harrell Company, 127 Jackson street, Knoxville, Tennessee.

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" 'The undersigned principal, and the endorsers of this note which is filled up before signing, agree that if this note is placed in the hands of an attorney-at-law for collection, or has to be sued on, that they will pay ten per cent. attorney's fees, in addition to the principal, which shall be added to and become a part of the judgment.

" 'No..... Due'.....

.....'

"But that complainant has consented to pay interest on said note if the defendants will execute a proper contract for recordation."

The bill thereupon concludes in the usual form (except that it does not waive an answer under oath), making the appellee a party defendant; containing the prayers that "if deemed necessary or advisable the said Hazen may be required to disclose herein the names and addresses of the persons represented by him as the trustee as aforesaid and that they may be made parties defendant hereto; that said Hazen and the parties represented by him as trustee as aforesaid may be required specifically to execute and perform said contract of March 14, 1917; that said Hazen and said parties represented by him as such trustee may be required to reduce said contract to proper form for recordation in the clerk's office of Lee county; that proper process may issue * * *," etc., etc.

The defendant demurred to the bill. Such demurrer was sustained by the court below and the decree complained of was entered dismissing the bill.

The following grounds of demurrer were assigned in the court below and are relied upon by the defendant here, viz:

"The defendant, R. S. Hazen, in his own right, and as trustee, says that complainant's bill in this cause is not sufficient in law.

"The grounds for said demurrer are as follows:

"First: Because the alleged contract of March 14, 1917.

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and sought to be enforced herein, is an incomplete and tentative contract, and being such contract, a court of equity will decline to specifically execute it.

"Said alleged contract contains the following provisions and stipulation:

" 'Terms of sale half cash when transfer papers are properly gotten up and the remainder to be settled by note payable six months from date.'

"From said provision and stipulation, it clearly appears that all the negotiations had not been concluded, but on the contrary it clearly appears therefrom that a subsequent and more formal agreement was intended to be entered into in which new and additional terms were to be introduced, not contained in the former agreement. In such case, the first agreement is not binding: The court will refuse to act even when it only rests reasonably doubtful whether what passes between the parties was conclusive, or still in treaty, no matter how near the parties may seem to have reached a final agreement.

"Second: Because the allegations of said bill, show that said alleged contract of said date, is not certain and definite in all its parts, and also the said allegations show that the terms of said contract are not certain, definite or mutual.

"When the parties submitted to each other the subsequent agreements or contract as contemplated by said tentative agreement to be drawn up and executed by the parties, a different interpretation is and was put upon the terms used therein by them respectively.

"In said case the rule is as follows:

" 'Where the court is unable from all the circumstances of the case, to say whether the minds of the parties met upon all the essential particulars, or if they did, they can not say exactly upon what substantial terms they agreed, or trace out any particular line where their minds met, specific performance will be refused.'

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"Third: Because the allegations of said bill show, that complainant is seeking to have specifically executed an alleged contract not contemplated or understood and not authorized by the beneficiaries or owners of the property, and which they refused to approve. All of which is and was known to complainant before the institution of this suit.

"Fourth: Because the term 'merchantable' used in said alleged contract of March 14, 1917, is not one that the law can define.

"Fifth: Because the allegations of said bill show, that to decree specific performance of said alleged contract, being only a tentative one, the court would have to do one of two things, either

"(a) To compel the defendant to part with property not contemplated or intended to be contracted by him, or

"(b) To compel the complainant to receive and take property not contemplated or intended to be purchased by him.

"To do either would be for the court to make a contract for the parties, which it will not do.

"The rule as understood in such cases is:

" 'If the description of the property, the subject matter of the sale, or the terms of the contract are ambiguous so that one party may have reasonably made a mistake as to the subject matter for the terms of the contract, or may have reasonably put a different construction on the contract from that which was contemplated by the other, the court will not assist either of them in enforcing the contract against the other.'

"Sixth: Because the allegations of said bill show that said tenative contract does not fix the time for the removal of the timber, and that the parties have failed to do so under the proposed, subsequent contract, or to settle the question of interest on the deferred purchase money as was contemplated by them in the said tentative contract.

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"Seventh: Because the said allegations of the said bill show that the parties have not made a complete and final contract in writing for specific execution, and that there is no such contract alleged in said bill that can be specifically executed."

Eugene C. Massie, for the appellant.

B. H. Sewell, for the appellees.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The authorities have long since settled what character of executory contract a court of equity will enforce by requiring specific performance of it. Where the contract is in writing it must contain "all the essential elements of a valid executory contract—that is to say, competent parties, a legal subject matter, a valuable consideration and mutual assent. Minor's Inst. Pt. I (1st ed.), p. 16"; *Hairston* v. *Hill,* 118 Va. 339, 342, 87 S. E. 573, 575. "The whole question is one of intention. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; * * *." *Boisseau* v. *Fuller,* 96 Va. 45, 46, 30 S. E. 457. It is also true, as urged in behalf of the appellee, that "the parties must be fully agreed and must intend the agreement to be binding." (And) "if, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. Clark on Contracts, p. 38." *Boisseau* v. *Fuller, supra,* 96 Va. pp. 46-7, 30 S. E. 457. The writing is not a contract

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if it is "a mere memorandum of incomplete negotiations in which the minds of the parties never met and from which either party could recede at will." *Hairston* v. *Hill, supra,* 118 Va. p. 342, 87 S. E. 575. See also, to same effect, Pom. Spec. Perf. pp. 81-89; *Berry* v. *Wortham,* 96 Va. 87-89, 30 S. E. 443; cases cited 12 Michie's Dig. Va. & W. Va. Cas. 514; Tyron Spec. Perf. of Contracts, New Am. Ed. 230-342; *Graham* v. *Call,* 5 Munf. (19 Va.) 396; *Milnes* v. *Gray,* 14 Ves. (Jr.) 400; *Baker* v. *Glass,* 6 Munf. (20 Va.) 212; *Huddleston* v. *Briscoe,* 11 Ves. (Jr.) 592; *Hinchman* v. *Ballard,* 7 W. Va. 152; *Clinchfield Coal Corp.* v. *Powers,* 107 Va. 393, 59 S. E. 370; *Creecy* v. *Grief,* 108 Va. 320, 322-3, 61 S. E. 769. As said by Jessel, N. R., in *Winn* v. *Bull,* 7 Ch. Div. 27-32 (quoted with approval in *Boisseau* v. *Fuller, supra,* 96 Va. at page 47, 30 S. E. 457: "It comes therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. Where it is not expressly stated to be subject to a formal contract, it becomes a question of construction whether the parties intended the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail." See to same effect *Harrison* v. *Parmer,* 76 Ala. 157, also cited and quoted from with approval in *Boisseau* v. *Fuller, supra,* 96 Va. at pages 47-8, 30 S. E. 458. And, "every application for the specific performance of a contract is addressed to the sound discretion of the court, regulated by established principles. The contract must be distinctly proven, and its terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirous, prompt and eager." *Darling* v. *Cumming's Ex'r,* 92 Va. 525, 23 S. E. 881.

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In the light of the general principles established by the authorities, some of which are above referred to, we come now to consider and dispose of the questions arising from the positions taken by the appellee in the cause before us, in their order as stated below.

1. The 1st, 2nd, 5th and 7th grounds of demurrer, all raise one and the same questions, namely:

What is the true construction and effect of the following clause in the written instrument of March 14, 1917, sought to be enforced as a binding contract, to-wit:

"Terms of sale half cash when transfer papers are properly gotten up, and remainder to be settled by note payable six months from date"?

Construing this clause, along with the whole instrument, we are of opinion that its language is not ambiguous and plainly refers only to such formal papers as were necessary to carry into effect the contract of March 14, 1917. The case before us is not, in truth, one where a further *executory* contract between the parties was contemplated by them. The only further "papers" which were to be executed by them, as expressly stated in the contract of March 14, 1917, were "transfer papers * * * properly gotten up" and a "note (of appellant) payable six months from date" for the deferred payment of one-half of the purchase money for the timber. That is to say, the further papers to be executed by the parties were not to be of an *executory* character, in so far as the contract in question was concerned, but were to consummate and carry into effect that contract—to execute that contract, to the extent of making a "transfer" or conveyance to the appellant in accordance with his rights under such contract. It was the same thing in effect as if the contract of March 14, 1917, had provided that the appellee should make to the appellant a good and sufficient deed of conveyance of the timber purchased as set forth in such contract, properly executed to carry such

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contract into effect and that appellant, upon the date of delivery to him of such conveyance, should pay to appellee one-half of the purchase money for the timber provided for in the said contract in cash and that appellant should, at the same time, execute and deliver his note to appellee for the remainder of such purchase money payable six months from the date of March 14, 1917, contract.

2. The third ground of demurrer takes the position that the refusal of the appellee and his co-owners to execute the contract of March 14, 1917, unless the words "all merchantable timber" be given a meaning of "all timber measuring fourteen inches in diameter and upward, two feet from the ground, that could be sawed into sound, merchantable lumber," evidenced that there was not a meeting of the minds of the parties to the contract of March 14, 1917, in its use of the words "merchantable timber."

We are of opinion that this position is not well taken. The contract is in itself conclusive that there was a meeting of the minds of all the parties thereto in its use of the words "all merchantable timber" as descriptive of the timber sold and purchased. What may be the proper construction of that language is a wholly different matter. If it has a certain and definite meaning, which may be ascertained by established methods of construction of the provisions of contracts (as we shall presently see it has), that is sufficient, in so far as the validity of the contract in that particular is concerned. As said by this court in *Hairston* v. *Hill*, *supra*, 118 Va. 339, 87 S. E. 573: "These questions of construction arise in a majority of cases that come before the courts for the interpretation and enforcements of contracts, but are never considered as grounds for cancelling the instrument."

So far as appears from the bill none of the co-owners with appellee have questioned the general authority or power of the latter to enter into the contract of March 14,

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1917. Their minds met the mind of appellant to the extent of entering into such contract. They differed with the mind of appellant only upon the construction of the terms used in the contract.

3. The fourth ground of demurrer takes the position that the term "merchantable" used in the contract of March 14, 1917, is not one that the law can define.

We are of opinion that this position is not well taken.

In *Ragland* v. *Butler*, 59 Va. (18 Gratt.) 323, this court held that the language of a contract, "merchantable * * * timber" bought for the purpose of manufacture into lumber, had a definite meaning which the law can define. It was there held that "merchantable timber" as those words were used in that contract, was such timber as could be manufactured into lumber marketable at the place of delivery of the lumber specified in the contract.

In *Stuart* v. *Pennis*, 91 Va. 688, 22 S. E. 509, the contract was for "merchantable timber at $3.00 per tree" of certain size. Upon consideration of the demurrer to the bill for specific performance of the contract this court said: "There was and could be no objection urged against the relief sought growing out of any indefiniteness as to the terms of the contract or as to its subject matter."

In *McCorkle & Son* v. *Kincaid*, 121 Va. 546, 93 S. E. 642: "Where timber was bought for manufacture into lumber, this court held that "sound merchantable logs, as those words are used in the contract under consideration, are logs that have a commercial value for manufacture into lumber, and such as are ordinarily used for that purpose in that locality."

We are of opinion, that in the instant case, in which the contract does not limit the purpose for which the timber was bought, beyond the stipulation that it must be "merchantable," "all merchantable timber," as those words are used in the contract under consideration, is all timber—

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whatever its size—that had, at the date of the contract, or may have during the life of the contract, a commercial value in that locality, for the purpose of manufacture into lumber, or for any other purpose. Hence the term "merchantable" used in such contract is one that the law can define, and the contract in that behalf has "a legal subject matter." (As stated in the contract, the oak, on one portion of the land mentioned and described in the contract, is excepted from the timber sold and purchased as per such contract.)

4. The sixth and only remaining ground of demurrer stated in the court below or urged before us is that the contract of March 14, 1917, was incomplete and non-enforceable because (a) it does not fix any time for the removal of the timber or (b) settle the question of interest on the deferred purchase money.

Taking up these positions in their order, as stated:

(a) It is well settled that where no time for the removal of timber is specified in timber contracts, the contracts will be construed as providing, by implication, for "a reasonable time" for such removal. *Wright* v. *Camp Mfg. Co.*, 110 Va. 678, 66 S. E. 843; *Carpenter* v. *Camp Mfg. Co.*, 112 Va. 300, 71 S. E. 559; *Brown* v. *Surry Lumber Co.*, 113 Va. 503, 508, 75 S. E. 84; and authorities cited in such cases. The contract in the case before us, therefore, was not incomplete, as it must be regarded in a court of equity (or at law, for that matter), nor unenforceable, because of the omission in question.

(b) The contract does settle the question of interest on the deferred purchase money. It is specific in its provision that the note for such deferred purchase money should be made payable "six months from date," *i. e.*, six months from the date of said contract of March 14, 1917, *i. e.*, it was to be made payable September 14, 1917. Had the note been executed in accordance with such contract it would have borne no interest unless and until default had been

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made in its payment on its due date, September 14, 1917. And, as appears from the allegations of the bill, such was also the appellee's construction of the contract, as evidenced by the form of note he sent appellant to execute.

5. However, should it develop in the further progress of this cause that the allegations of the bill are sustained by a preponderance of the evidence and decree on the merits of the cause be entered in favor of appellant enforcing specific performance of said contract of March 14, 1917, we are of opinion that no interest should be decreed against appellant prior to the entry of such decree, but such decree should provide for the payment by appellant of the principal of the whole of the purchase money aforesaid upon the execution and delivery to him of such a conveyance to him of the timber purchased, as set forth and described in said contract, as is demanded in the bill, duly acknowledged for recordation according to law. In which case, of course, should there be any delay in the payment by appellant of such purchase money at the time required by such decree it would all bear interest from such time.

6. With regard to the requirement, that such a deed as is in the bill demanded, duly acknowledged for recordation according to law, should be executed by appellee and his co-owners; we are of opinion that a reasonable construction of the language of the contract—"transfer papers properly gotten up"—is that such language carries with it the meaning that a conveyance in writing such as aforesaid, properly acknowledged for recordation as aforesaid, was within the mutual meaning and contemplation of both parties to such contract.

7. No question is raised in this cause upon the demurrer to the bill, as to the existence of the other requisites to entitle the appellant to specific performance of the contract, namely, as to there having existed competent parties to, a valuable consideration for the contract, and that the appel-

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lant "has not been backward in enforcing his rights but ready, desirous, prompt and eager" and able to comply with all the terms of the contract on his part.

On the whole, therefore, we are of opinion that the court below was in error in sustaining the demurrer to the bill in this cause and the decree complained of will, therefore be set aside and annulled and this cause will be remanded to the court below for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Reversed.

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Staunton.

AETNA INSURANCE COMPANY v. ASTON.

September 19, 1918.

1. APPEAL AND ERROR—*Conflicting Evidence.*—The verdict of a jury upon questions of fact, upon conflicting evidence, is conclusive as to such questions.
2. FIRE INSURANCE—*False Statements—Questions of Law and Fact.*—In an action upon a fire insurance policy whether plaintiff made false statements in making his proof of loss is a question for the jury under all the facts and circumstances of the case.
3. FIRE INSURANCE—*Assignment of Policy—Forfeiture.*—Under a policy of insurance, which provides that the policy shall be void if it is assigned before loss, an actual assignment of the policy without the consent of the company will work a forfeiture, but a mere agreement to assign it will not.
4. FIRE INSURANCE—*Policy as Chose in Action—Assignment.*—After the risk has terminated by fire, the interest of the assured becomes a *chose in action*, which he has a right to assign, in spite of the usual clause against assignment, without asking permission of the company.
5. FIRE INSURANCE—*Right of Possession.*—If at the time of the fire there had been no change in the title and ownership of the property, it necessarily follows that there had been no change in the *right* of possession, as distinguished from mere occupancy.
6. SPECIFIC PERFORMANCE—*Husband and Wife—Contract not Enforceable.*—Upon principles of public policy, a party to a contract of exchange of lands could not enforce the contract of exchange, where the wife of the other party had never signed the contract, although she was part owner of the land and had her dower interest in the remainder of the land.
7. SPECIFIC PERFORMANCE—*Conditional Contract.*—A contract of exchange of lands cannot be enforced at the instance of either party, when it is conditional and dependent upon the will of third persons, namely, the lien creditors of both parties.
8. FIRE INSURANCE—*Change of Ownership or Possession—Case at Bar.*—A. agreed with K. and his wife to exchange A.'s mill

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property and other property for K.'s farm and a lot. The contract for the exchange purported to be with K.'s wife also, but she did not sign it, although she owned, with her husband, a one-half undivided interest in the farm, and had her inchoate dower interest in all of the land owned by her husband. There was a verbal agreement that A. would assign his insurance to K., and that K. would assign his insurance to A. K. took possession of the mill. The trade was not closed by deeds because there were deed of trust liens on both properties, but deeds were made and deposited, in escrow, with a bank. This status remained until fire destroyed the mill. By a supplemental contract dated after the fire, it was recited that all of the conditions of the original contract had been complied with, and in consideration thereof, A. bound himself to pay over to K. the insurance collected on account of the fire loss.

Held: That there had been no change in the title, ownership, or in the legal right of possession of the property within the clause of the policy providing for its forfeiture upon such change without the consent of the company.

9. FIRE INSURANCE—*Change of Possession.*—The change of possession contemplated by the policy is a change in the lawful right of possession as distinguished from mere occupancy.

10. FIRE INSURANCE—*Possession.*—Possession under the alienation clause means, in general, the right of possession, rather than the physical occupancy of the property.

11. FIRE INSURANCE—*Increase of Hazard—Change of Possession—Questions of Law and Fact.*—Where a policy permits a change of occupants without an increase of hazard, it is for the jury to determine whether or not the change increased the risk.

12. FIRE INSURANCE—*Presumptions and Burden of Proof—Questions of Law and Fact.*—Whether the company, in defending an action on a policy, relies upon the falsity of a particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact in either aspect.

13. FIRE INSURANCE—*Chance of Possession—To Whose Benefit Judgment Inures.*—A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of conditions, does not affect the validity of the policy, and, if a loss occurs before the conditions are performed, a recovery may be had by the insured even though the conditions are subsequently performed, and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit.

14. FIRE INSURANCE—*Change of Possession—By Whom Action Brought—Case at Bar.*—Under section 2860, Code of 1904,

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K., in the instant case, could have sued in his own name, but not having done so, a recovery for his benefit is not thereby barred. It appearing from the record that the suit is in fact for the benefit of K., the judgment may be so marked and rendered even after verdict. The endorsement of the fact is sometimes not made until after the execution is issued.

Error to a judgment of the Corporation Court of city of Bristol, in a proceeding by motion for a judgment for money. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

John W. Price and *Caskie & Caskie*, for the plaintiff in error.

White, Penn & Penn, and *John J. Stuart*, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This was a motion for judgment upon a fire insurance policy and resulted in a verdict for defendant in error, Aston, plaintiff below, for $5,000, the full amount of the policy. The case was submitted to the jury without instructions, and is before us upon a writ of error to the action of the trial court in overruling the motion of the insurance company to set aside the verdict as contrary to the law and evidence, and rendering judgment thereon for the plaintiff.

For the most part the issues raised in the grounds of defense and the motion to set aside the verdict, and reiterated in the petition for a writ of error, involved questions of fact, and having been resolved adversely to the insurance company upon conflicting evidence, are concluded by the verdict of the jury.

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It is not denied that at the time the insurance was taken out Aston was the fee simple owner of the property insured, and there had been no change of title between that time and the date of the fire; because both the agreement to sell and the deeds of conveyance made in pursuance thereof had previously been delivered in escrow and were so held when the fire occurred. The same is true of the right of possession, which rested upon exactly the same title papers. Therefore, the occupancy of the mill property by Kendrick at the time of the fire did not rise to the dignity of a *right of possession*, but was dependent upon matter of *grace* and not of *contract*.

These questions, and others involved in the case, have been so satisfactorily discussed and disposed of in the opinion of the learned judge of the Corporation Court of the city of Bristol, both upon the law and the evidence that we are content to adopt his opinion as the opinion of this court. It reads as follows:

"The contract of insurance is the standard policy covering plaintiff's flouring mill building, machinery and equipment, which was totally destroyed by fire on October 11, 1912. The policy contains the identical clauses as to unconditional and sole ownership and as to change in interest, title or possession of the property which are quoted and construed in *Rochester German Ins. Co.* v. *Monumental Savings Ass'n*, 107 Va. 701 [60 S. E. 93]. The policy also contains all the other usual conditional and restrictive clauses, violation of which avoids the policy.

"After the insurance was written but before the fire, by contract in writing, dated August 3, 1912, W. H. Aston, the plaintiff, agreed with Ellis M. Kendrick 'and his wife Cora E. Kendrick' to exchange Aston's mill property and a house and lot both located at Meadow View, Washington county, Virginia, for Kendrick's Rector and Rickett's farm of about 132 acres and his lot recently bought at public sale, both

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of which are also located at the same place. The contract for the exchange of properties purports to be with Mrs. Kendrick also, but she did not sign it, and the evidence shows that she owned, with her husband, a one-half undivided interest of seventy acres of the farm, and, of course, had her inchoate dower interest in all of the land owned by her husband. The mill property cost $15,500. As a basis for the exchange, Mr. Aston valued at $12,000 the lot without the building, and machinery, being worth $1,200 or $1,500. There was other evidence that the mill property was worth $15,000. There was additional insurance on the mill property, making an aggregate of $10,000, which was payable to Straley and Hurt, trustees, as their interest may appear.

"There was a verbal agreement as a part of the trade, that Aston would assign his insurance to Kendrick, and that Kendrick would assign his insurance to Aston.

"Kendrick took possession of the mill, made some repairs, and proceeded to operate same from and after the date of the contract, August 3, 1912. Aston took possession of the farm the same date, except as otherwise provided in the contract, Kendrick remaining in possession of a part.

"The trade was not closed by deeds because there were deed of trust liens on both properties, and Kendrick had not yet paid for in full nor received a deed for his lot purchased at public sale. But deeds were made and deposited, in escrow, with the First National Bank at Abingdon, with directions as follows:

" 'These papers to be delivered to W. H. Aston and E. M. Kendrick when they jointly call for them.'

"The contract provided that the deeds for the farm and mill property 'shall be made as soon as possible.' This status of their affairs so remained until the fire destroyed the mill and machinery on October 11, 1912. Mr. Aston testified that he had not removed the $10,000 lien on the mill

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property before the fire, but had contracted for the removal of same in this way: that Mr. Hurt had agreed for him to substitute the Kendrick farm as security in lieu of the mill property.

"By supplemental contract in writing dated October 31, 1912, it was recited that all of the conditions of the original contract had then been complied with and the original contract carried out as originally intended, and in consideration whereof, Aston bound himself to pay over to Kendrick 'any insurance which he may be able to collect on account of said fire loss and to do anything necessary and proper to be done by him to further the collection of such fire loss for the benefit of' Kendrick.

"Aston also testified that he expected no part of the recovery, but that he would, of course, have been interested in same if the trade had not been perfected.

"The defendant filed the grounds of its motion in writing, the most, if not all of which, involve questions of fact concluded by the verdict.

"The defendant contends, as grounds for the motion, that the property was excessively insured and that the same was wilfully burned by Kendrick. But both of these contentions involve a conflict of evidence, and are concluded against the company by the verdict of the jury. *National Union Fire Insurance Co.* v. *Burkholder*, 116 Va. 942 [83 S. E. 404].

"As to whether plaintiff made false statements in making his proof of loss was also 'a question for the jury under all the facts and circumstances of the case.' *North British & Mer. Ins. Co.* v. *Nidiffer*, 112 Va. 591, 596 [72 S. E. 130, 132, Ann. Cas. 1916 A, 464]."

As one ground of its motion, defendant copies one of its grounds of defense as follows:

"'If the plaintiff should attempt to prove that any assignment of the policy was made, or attempted to be made before loss, the defendant will rely upon that clause of the

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policy which provides that it shall be void if it is assigned before loss.'

"This ground is without merit. While an actual assignment of the policy without the consent of the company will work a forfeiture, a mere agreement to assign same will not. 'An agreement to assign the policy is not a breach of the condition.' Cooley's Briefs on the Law of Ins., Vol. II, p. 1864, citing *inter alia, Fire & Marine Ins. Co.* v. *Morrison,* 11 Leigh (38 Va.) 354, 36 Am. Dec. 385.

" 'After the risk has terminated by fire, the interest of the assured becomes a *chose in action,* which he has a right to assign, in spite of this clause, without asking permission of the company.' Richards on Ins. (2d ed.), sec. 148, p. 162. Cooley's Briefs on Law of Ins., Vol. II, pp. 1862-3.

"The ground chiefly relied upon in support of the motion is stated thus: 'After the issuance of the policy there was a change in the title, interest and possession of the property, and the change in title, interest and possession and ownership was without notice to the company.'

"If at the time of the fire there had been no change in the title and ownership of the property, it necessarily follows that there had been no change in the *right* of possession, as distinguished from mere occupancy.

"The defendant claims that under the contract for the exchange of the properties that Kendrick was the owner of the mill property at the time of the fire, relying upon the principle that equity 'looks upon things agreed to be done as actually performed,' and citing *Hurt* v. *Jones,* 75 Va. 341, 346.

"But the case and doctrine relied upon presuppose the existence of a *valid* and enforceable contract. Upon principles of public policy, Aston could not have at the time of the fire, nor at any time, enforced the contract, because Mrs. Kendrick had never signed it, and she was part owner of the farm and had her dower interest in the remainder of

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the land. *Haden* v. *Falls and others*, 115 Va. 779 [80 S. E. 576, Ann. Cas. 1915 C, 1034]. Nor could the contract have been enforced at the instance of either party, because it was conditional and dependent upon the will of third persons, namely, the lien creditors of both parties. *Fire & Marine Ins. Co.* v. *Morrison*, 11 Leigh (38 Va.) 367 [36 Am. Dec. 385].

"In the case last cited there was a contract of sale and the purchaser was to procure an assignment of a bond of a third person in part payment for the residue, and it was verbally agreed between the parties, as in the case at bar, that the vendor should assign the insurance to the vendee. There was a loss of the house on the property by fire before the trade was closed by deed. The contract was subsequently carried into effect by the parties, as was done in the case at bar. It was held that the vendor could recover on the policy because he did not have a contract which he could specifically enforce in a court of equity.

"In *Christian* v. *Cabell et al*, 22 Gratt. (63 Va.) 82, there was a contract for the sale of property which was encumbered. There was a loss by fire before the vendor removed the encumbrance. The contract was not enforced, the court holding as 'the result of all the cases' that 'any loss occurring to the property before the vendor was in a condition to convey a clear, unincumbered title must fall on him, and not on the purchaser' (p. 107). See, also, *Tazewell Coal & Iron Co.* v. *Gillespie and others*, 113 Va. 134, 143 [75 S. E. 757]; *Newberry* v. *French*, 98 Va. 479, 487 [36 S. E. 519].

"In *Rochester Ins. Co.* v. *Monumental Sav. Ass'n*, 107 Va. 701 [60 S. E. 93], in considering the identical clause involved in the case at bar at page 704 [60 S. E. 94], the court held: 'The insured will be construed to be the unconditional and sole owner, although he may have given an option or made a conditional sale, which he cannot specifically enforce, and where the risk of loss by fire continues to be his.'

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"But the defendant claims that in any event there was such a change in the possession of the mill property as to amount to a breach of the condition and avoid the policy. As already observed, if there has been no change in the title or ownership by reason of the contract, it would seem to follow necessarily that there has been no change in the legal right of possession of the property. That the change of possession contemplated by the policy is a change in the lawful right of possession as distinguished from mere occupancy, seems to be the reasoning if not the result of the decision of *Georgia Home Ins. Co.* v. *Bartlett*, 91 Va. 305, 312, 313 [21 S. E. 476, 50 Am. St. Rep. 832].

" 'Possession under the alienation clause means, in general, the right of possession, rather than the physical occupancy of the property.' Richards on Ins. (2d ed.), sec. 147, p. 161, 2 Cooley's Briefs on Law of Ins., p. 1723.

"A case which seems to be exactly in point and instructive on almost every phase of the case at bar, wherein the defendant was the same, the policy was the same, where there was an executory contract for the sale and exchange of properties and deeds placed in escrow upon conditions as to title, a loss by fire, and similar in other particulars, is that of *Pomeroy* v. *Aetna Ins. Co.*, 86 Kan. 214, 120 Pac. 344, Ann. Cas. 1913 C, 170, 38 L. R. A. (N. S.) 142, and *note*. At page 218 of 86 Kan., at page 346 of 120 Pac., at page 145 of 38 L. R. A. (N. S.) Ann. Cas. 1913 C, 170, the court said: 'There was no transfer of the title to the land nor of the right of possession to either property to which the contract applied. Occupancy had been exchanged, but it seems apparent that, in case of the failure or inability of either party to comply with the conditions of sale and purchase, the other could have recovered the occupancy of his own property.'

"Where, under a contract which the vendor cannot enforce and with which the vendee is not bound to comply, a

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loss by fire results, the vendor may recover, although the vendee has possession and has paid as much as $1,200 on a total of $6,000. *Phoenix Ins. Co.* v. *Kerr* (U. S. Cir. Ct. of App., 8th Cir.), 129 Fed. 723 [64 C. C. A. 251], 66 L. R. A. 569, digested and cited with approval in *Rochester Ins. Co.* v. *Monumental Sav. Ass'n*, 107 Va. 701, 704-705 [60 S. E. 93].

"Defendant also claims that there was an increase of hazard by reason of the change. The policy permits a change of occupants without an increase of hazard. 'In such a case it is for the jury to determine whether or not the change increased the risk.' 2 Cooley's Briefs on Law of Ins., p. 1726.

"All other similar claims and arguments advanced in support of the motion and not hereinbefore specificially discussed seem to be concluded by the verdict of the jury according to 2 Thompson on Trials (2d ed.), section 1290, which reads in part as follows: 'It is a familiar rule in the law of fire insurance that any change in the condition of the property insured, which substantially increases the risk, avoids the policy; but whether such a change has taken place is always a question of fact for a jury. Whether the company, in defending an action on a policy, relies upon the falsity of the particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact in either aspect.'

"One other contention made by defendant is: 'The record shows that the plaintiff has no interest in the policy sued on, and does not seek to recover in terms as beneficiary for Ellis M. Kendrick.'

"The law applicable to this case and to this contention is stated in Wood on Fire Ins. (2d ed.), sec. 353, Vol. I, p. 736, as follows: 'A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of conditions, does not affect

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the validity of the policy, and, if a loss occurs before the conditions are performed, a recovery may be had by the insured even though the conditions are subsequently performed, and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit.'

"Under section 2860 of the Code, Kendrick could have sued in his own name, but not having done so, a recovery for his benefit is not thereby barred. It appearing from the record that the suit is in fact for the benefit of Kendrick, the judgment may be so marked and rendered even after verdict. The endorsement of the fact 'is sometimes not made until after the execution is issued.' *Western Union Tel. Co.* v. *Bank,* 116 Va. 1009, 1013 [83 S. E. 424, 425]; Burks' Pl. & Pr., p. 57."

For these reasons, the judgment under review must be affirmed.

Affirmed.

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Staunton.

ALBERT v. STAFFORD AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. WILLS—*Execution—Subscribing Witnesses—Probate.*—Where the proponents of a purported will, written by one other than the testatrix, failed to show that the testatrix either signed or acknowledged its execution in the presence of the subscribing witnesses, it is error to admit the paper to probate under Code of 1904, section 2514.

Error to an order of the Circuit Court of Giles county, admitting a paper to probate as a will.

Reversed.

The opinion states the case.

W. B. Snidow, for the plaintiff in error.

Williams & Farrier and *W. J. Henson*, for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

The petitioner complains of an order admitting a paper to probate as the will of Jennie A. Stafford. It appears from a certificate of the evidence that John R. Stafford wrote the paper as and for the will of Jennie A. Stafford, who was eighty-four years old, and that he called in J. E. Stafford and J. T. Durham to witness it. The paper was folded up so as to conceal any writing which may have been

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on it, and the subscribing witnesses were asked to sign their names to the paper thus folded. J. E. Stafford, one of the subscribing witnesses, objected to signing it because he did not know what he was signing, but John R. Stafford assured the subscribing witnesses that there was nothing in it that would hurt them, and because of their confidence in John R. Stafford, as they say, they signed their names to the paper while so folded. They did not see the name of Jennie A. Stafford on the paper if it was on there; they did not know whether her signature was on it or not, and did not know whether Jennie A. Stafford knew what they were signing; that she was there but said nothing and did nothing; that she did not ask them to witness her signature or to witness her will, and did not sign the paper in their presence nor acknowledge that she had signed it, or that it was her will; and there is an entire lack of testimony from which it can be inferred that she ever signed it, or that she knew that these witnesses were attesting her signature.

That the circuit court erred in admitting the paper to probate is manifest because the proponents have failed to show that Jennie A. Stafford either signed or acknowledged its execution in the presence of the subscribing witnesses. (Code 1904, sec. 2514.)

Reversed.

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Syllabus.

Staunton.

BOWLING V. COMMONWEALTH.

September 19, 1918.

1. BAIL AND RECOGNIZANCE—*Exoneration of Bail.*—Bail will generally be exonerated from liability where the performance of the conditions of the recognizance are rendered impossible by (1) the act of God, (2) the act of the law, or (3) the act of the obligee.
2. COURTS—*Conflict of Jurisdiction Between State and United States Court.*—Where the State court and United States court both have jurisdiction of a person accused of crime, the tribunal that first takes jurisdiction retains it to the exclusion of the other, until its duty with respect to the matter has been fully discharged and the jurisdiction exhausted. The rule applies both to civil and criminal cases.
3. PRISONS AND PRISONERS—*Conflict of Jurisdiction Between State Courts and Courts of the United States.*—If a person is in the actual custody of the United States for a violation of its laws, no State can by *habeas corpus*, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State, is by express enactment, beyond the reach of the federal courts or judges. Judiciary act, section 14; act March 2, 1833, section 7; 4 Stat. at Large, 634.
4. BAIL AND RECOGNIZANCE—*Forfeiture—Discretion of Court.*—At common law our courts possessed and in proper cases exercised the power of sparing the recognizance before the same was adjudged to be forfeited and to decline to award a *scire facias* thereon. This rule has been extended and enlarged by statute so as to invest the courts with discretionary powers to meet the exigencies of particular cases by remitting the penalty in whole or in part, and rendering judgment on such terms and conditions as it deems reasonable. Code of 1904, section 4099.
5. BAIL—*Forfeiture—Case at Bar.*—In the instant case accused was indicted for a felony and entered into a recognizance with plaintiff in error as his surety. Accused failed to appear pur-

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suant to the requirement of his recognizance. The bail was guilty of no negligence whatever, and, without fault on his part, the Commonwealth's attorney, the representative of the State, with full knowledge of the facts, voluntarily suffered the principal to be taken out of the control of his bondsman by federal authority, by which act the latter was rendered powerless to produce the principal at the time and place of trial.

Held: That, in these circumstances, in the reasonable exercise of its discretionary power under the statute, the circuit court ought to have rendered judgment exonerating the plaintiff in error from liability upon the recognizance.

Error to a judgment of the Circuit Court of Floyd county, upon a judgment upon a writ of *scire facias* against a surety upon a bail bond.

Reversed.

The opinion states the case.

John P. Lee, for the plaintiff in error.

John R. Saunders, Attorney-General, and *J. D. Hank, Jr., Assistant Attorney-General,* for the Commonwealth.

WHITTLE, P., delivered the opinion of the court.

At the April term, 1915, of the Circuit Court of Floyd county, Posey Griffith was indicted for a felony and entered into a recognizance in the penalty of $500, with plaintiff in error, J. W. Bowling, as his surety, conditioned according to law, for his appearance, etc., on July 15, 1915. Griffith failed to appear pursuant to the requirement of his recognizance and the same was forfeited. Thereupon, a writ of *scire facias* was issued against the parties, summoning them to appear before the circuit court on the first day of February term, 1916, to show cause why the Commonwealth should not have judgment against them for the

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amount of the penalty of the bond. Upon that proceeding the judgment under review was rendered against the plaintiff in error.

The agreed facts are set out in a special plea filed by Bowling to the writ of *scire facias*, and are substantially as follows: Griffith was arrested by authority of the government of the United States in Franklin county, wherein he resided, in the western district of Virginia, upon a charge of felony committed after the date of the recognizance in question. For that offense he was indicted and tried in the District Court of the United States for the western district of Virginia, in the city of Roanoke, on June 24, 1915, and found guilty and sentenced to confinement in the Moundsville penitentiary, in the State of West Virginia, for the term of three years. So that, on July 17, 1915, the day on which he was recognized to appear before the Circuit Court of Floyd county, he was in the custody of the United States authorities serving a term in the federal penitentiary. These facts were known to the Commonwealth's attorney of Floyd county, who made no effort to maintain the superior right of the State of Virginia to the custody of the prisoner on the ground that the State court had first acquired jurisdiction.

Stated generally, the rule is well established that bail will be exonerated from liability where the performance of the conditions of the recognizance are rendered impossible by (1) the act of God, (2) the act of the law, or (3) the act of the obligee. *People* v. *Bartlett*, 3 Hill (N. Y.) 570; *Way* v. *Wright*, 46 Mass. (5 Metc.) 380; *State* v. *Allen*, 21 Tenn. (2 Humph.) 258; *Mix* v. *People*, 26 Ill. 32; *Taylor* v. *Taintor*, 83 U. S. (16 Wall.) 366, 21 L. Ed. 287; *Caldwell* v. *Commonwealth*, 14 Gratt (55 Va.) 698.

The proposition is also firmly established that where the State court and United States court both have jurisdiction of a person accused of crime, the tribunal that first takes

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jurisdiction retains it to the exclusion of the other, until its duty with respect to the matter has been fully discharged and the jurisdiction exhausted. The rule applies both to civil and criminal cases. *Freeman* v. *Howe*, 65 U. S. (24 How.) 450, 16 L. Ed. 749; *Buck* v. *Colbath*, 70 U. S. (3 Wall.) 334, 18 L. Ed. 257; *Taylor* v. *Taintor, supra; Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96, 28 L. Ed. 690; Many other cases to the same effect might be cited.

So also, in *United States* v. *VanFossen*, 1 Dill. 406, 411, Fed. Cas. No. 16,607, it is said: "If a person is in the actual custody of the United States for a violation of its laws, no State can by *habeas corpus*, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State, is by express enactment, beyond the reach of the federal courts or judges. Judiciary act, section 14; act March 2, 1833, section 7; 4 Stat. at Large 634; *Ex parte Dorr*, 3 How. (44 U. S.) 103, 105, 11 L. Ed. 514; *United States* v. *French*, 1 Gallison 1, Fed. Cas. No. 15, 165; *Ex parte Forbes*, Dill. 363, Fed. Cas. No. 4, 921."

At common law our courts possessed and in proper cases exercised the power of sparing the recognizance before the same was adjudged to be forfeited and to decline to award a *scire facias* thereon. The rule is illustrated by *Craig's Case*, 6 Rand. (27 Va.) 731, where the principal was prevented by sickness from appearing in discharge of his recognizance. This rule has been extended and enlarged by statute so as to invest the courts with discretionary powers to meet the exigencies of particular cases by remitting the penalty in whole or in part, and rendering judgment on such terms and conditions as it deems reasonable. Code, section 4099.

In *Caldwell's Case, supra*, at the time Caldwell was required to appear in discharge of his recognizance he was serving a term in the State penitentiary for another felony

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of which he had been convicted by the Commonwealth of Virginia. And this court, in an opinion delivered by Moncure, J., in which all the judges concurred, reversed the judgment of the circuit court and held that the prisoner's confinement in the penitentiary rendered it impossible for him to appear at the court in accordance with the requirement of his bond; which fact, under the circumstances, constituted a good defense for the bail to the *scire facias*. It will be observed that the Commonwealth of Virginia, the obligee in the recognizance, in that case, by the subsequent arrest and conviction and imprisonment of the principal for another felony, had rendered his compliance with the condition of his recognizance impossible, so that it was estopped to enforce a forfeiture of its own creation.

In *Taylor* v. *Taintor, supra*, Mr. Justice Swayne, delivering the opinion of the court (16 Wall. 369, 21 L. Ed. at p. 290), observes: "If the principal is arrested in the State where the obligation is given and sent out of the State by the Governor, upon the requisition of the Governor of another State, it is within the third" (the act of the obligee). "In such cases the Governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion. But if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect. The authorities last referred to proceed upon this principle." *Kentucky* v. *Dennison*, 65 U. S. (24 How.) 66, 16 L. Ed. 717.

So, in *Re James* (Circuit Court of the U. S. for the western district of Missouri), 18 Fed. 853, it was held, that the removal of a prisoner by a court of competent jurisdiction beyond the control of his bondsman, rendering

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him unable to produce his principal at the time and place set for trial, constituted a defense to a suit on the bond.

The case in judgment is controlled by the foregoing authorities, including *Caldwell's Case, supra.* The bail was guilty of no negligence whatever, and, without fault on his part, the Commonwealth's attorney, the representative of the State, with full knowledge of the facts, voluntarily suffered the principal to be taken out of the control of his bondsman by federal authority, by which act the latter was rendered powerless to produce the principal at the time and place of trial. We are of opinion that in these circumstances, in the reasonable exercise of its discretionary power under the statute, the circuit court ought to have rendered judgment exonerating the plaintiff in error, J. W. Bowling, from liability upon the recognizance.

The judgment must, therefore, be reversed, and this court will enter judgment for the plaintiff in error.

Reversed.

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Staunton.

BRANHAM V. CLINCHFIELD COAL CORPORATION AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. LOST INSTRUMENTS AND RECORDS—*Proof to Establish—Jurisdiction of Equity.*—While courts of equity have jurisdiction to set up lost deeds and wills and to establish titles under them, the proof of the former existence, the loss and the contents of the instrument, should be strong and conclusive before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. This, however, is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised nor except upon the clearest and most stringent proof.
2. LOST INSTRUMENTS AND RECORDS—*Proof to Establish—Jurisdiction of Equity.*—In the instant case it was contended that there was a sale of the tract of land in question to the predecessor in title of the appellee by title bond or deed, and that the bond or deed had been lost or destroyed. The alleged transaction occurred twenty-eight years before the institution of the instant suit, and has been obscured by lapse of time and loss of evidence from death of parties and other causes. The evidence was voluminous and irreconcilably conflicting on the material issues, and fell far short of establishing the alleged sale, either by title bond or deed, and the loss of those instruments, with that strong and conclusive evidence that the law requires.
3. FRAUD AND DECEIT—*Forgery—Proof to Sustain.*—It is a fundamental principle of law that fraud must be clearly alleged and proven. Every presumption is in favor of innocence and not of guilt. In the instant case it was alleged that a certain deed was a forgery, but there was no evidence to sustain the averment.
4. VENDOR AND PURCHASER—*Parol Sale of Land—Evidence to Support.*—In the instant case plaintiffs attempted to set up a parol sale of the land in question and payment of the purchase money. No such case, however, was made by the pleadings; and if enforceable (Code 1904, section 2840), the admissible

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evidence in support of the contention is far too indefinite, vague and uncertain to warrant a decree thereon in favor of the plaintiffs.

Appeal from a decree of the Circuit Court of Wise county. Decree for complainants. Defendant appeals.

Reversed.

The opinion states the case.

Dotson & Kelly and *Bullitt & Chalkley,* for the appellant.

Morison, Morison & Robertson, Vicars & Perry and *W. H. Rouse,* for the appellees.

WHITTLE, P., delivered the opinion of the court.

Appellant, Wilburn Branham, and wife, and T. J. Fleming and N. B. Dotson were impleaded in the Circuit Court of Wise county by appellees, the Clinchfield Coal Corporation and the Carrier Lumber Corporation, the material allegations of the bill being: That in the year 1886, Elizabeth Branham, the mother of Wilburn Branham, conveyed her life estate in a tract of sixty-five acres of land lying in the waters of Pound river in Wise county, to N. B. Dotson; that John Henry Branham, another son of Elizabeth Branham, sold his remainder interest therein to Dotson *by deed* or *title bond,* which deed or title bond was lost or destroyed; that after Dotson had thus been invested with title to the sixty-five acres of land, through successive alienations the plaintiff, the Clinchfield Coal Corporation, acquired title to the land, and the plaintiff, the Carrier Lumber Corporation, became completely invested with title to the timber thereon; that after the death of John Henry Branham, Wilburn Branham having ascertained that the

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deed or title bond from John Henry Branham to Dotson had never been recorded and had been lost or destroyed, with full knowledge of the deed from his mother, and the deed or title bond from his brother, John Henry Branham, to Dotson, forged, or caused to be forged, a deed from John Henry Branham and wife conveying all their interest in the sixty-five acres of land to himself; that the forged deed purported to have been executed on August 15, 1887, and to have been acknowledged on May 10, 1889, before H. L. Pennington, a justice of the peace of Wise county, and was recorded August 31, 1910; and that Wilburn Branham and T. J. Fleming entered upon the land and cut and removed valuable poplar and other timber therefrom. The bill prayed that Wilburn Branham and wife be required to convey to plaintiffs, as their interests appeared, all the right and title claimed by him in the land or timber thereon; that an inquiry be directed to ascertain the value of the timber cut and removed from the land by Wilburn Branham and Fleming, and that judgment be rendered therefor and for damage for other trespasses, and that they be restrained from further trespassing on the land.

The defendant, Wilburn Branham, demurred to and answered the bill, but the demurrer was not pressed and need not be discussed. The answer denied the sale of the land, or the execution of the title bond or deed by John Henry Branham to Dotson; or that Dotson ever paid for the land, and that respondent knew of any such alleged facts. He admitted the execution, acknowlegment and recordation of the deed from John Henry Branham to himself, but denied that the deed was a forgery.

Numerous depositions were taken, and a number of exhibits filed; and from a decree granting the prayer of the bill this appeal was allowed.

It will be observed from the foregoing summary of the pleadings that the two vital issues are thereby submitted,

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the establishment of both or one of which is essential to the plaintiffs' right to recover.

1. The first contention is that there was a sale by John Henry Branham to Dotson of his remainder interest in the sixty-five acres of land by *title bond* or *deed* (neither of which instruments was produced), and, whether the one or the other, that it had been lost or destroyed; and

2. That the deed of record purporting to have been executed and acknowledged before a justice of the peace by John Henry Branham and wife conveying the land in controversy to Wilburn Branham was a forgery.

It may be remarked in passing that these transactions are alleged to have occurred twenty-eight years before the institution of this suit; and, as the record shows, they have been obscured by lapse of time and loss of evidence from death of parties and other causes. It will be helpful also to view the case in the light of the well settled rules of evidence in respect to the degree of proof required to establish a title dependent upon lost muniments.

In *Dickinson* v. *Ramsey,* 115 Va. 521, 79 S. E. 1025, it was held: "While courts of equity have jurisdiction to set up lost deeds and wills and to establish titles under them, the proof of the former existence, the loss and the contents of the instrument, should be strong and conclusive before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will."

In *Thomas* v. *Ribble,* 2 Va. Dec. 321, 24 S. E. 241, the above rule as to the degree of proof is announced, and it is said of a suit of this character, that it is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised nor except upon the clearest and most stringent proof." This doctrine has frequently been approved by this court. *Barley* v. *Byrd,* 95 Va. 316, 28 S. E. 329; *Carter* v. *Wood,* 103 Va. 68,

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48 S. E. 553; *Smith* v. *Lurty*, 108 Va. 800, 62 S. E. 789; *Johnson* v. *McCoy*, 112 Va. 580, 72 S. E. 123; *McLin* v. *Richmond*, 114 Va. 244, 76 S. E. 301.

The last pronouncement on the subject, which is equally as emphatic as any that had preceded it, is *Dunnavent* v. *Dunnavent*, 120 Va. 301, 91 S. E. 138. In that case as in this, the litigation arose nearly thirty years after the date of the alleged deed. The controversy was between a father and son. The father denied in the most positive and definite way that he ever executed such a deed as was claimed, while the grantee undertook to establish its due execution by his own testimony and that of his sister, and by the alleged draughtsman of the deed, a notary public, who also claimed to have taken the acknowledgment of the grantor to the instrument. The court commented upon the lapse of time between the alleged execution of the deed and the institution of the suit to set it up, and other circumstances, and held: "There was as irreconcilable conflict in the testimony of the father and son. The testimony of the alleged draughtsman of the deed was unconvincing. The other circumstances surrounding the alleged transaction were improbable." It further held that the evidence was insufficient to show the existence of the deed, and the decree of the circuit court establishing it was reversed.

The evidence in the instant case is voluminous and irreconcilably conflicting on the material issues. It has been examined with care, and a detailed discussion of it would be a fruitless task. It is sufficient to say, that it falls far short of establishing the alleged sale by John Henry Branham to Dotson of his remainder interest in the sixty-five acres of land either by title bond or deed, and the loss of those instruments with that strong and conclusive evidence that the law requires. Indeed, the proof on that subject is far from convincing, and is much more inconclusive than was the evidence held to be insufficient in *Dunnavent* v.

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Dunnavent, supra. With respect to the allegation of the bill that the deed from John Henry Branham and wife to Wilburn Branham was a forgery, it is enough to say that there is no evidence to sustain that averment. Of a similar charge, in *Dickenson* v. *Ramsey, supra,* this court (115 Va., at page 524, 79 S. E. 1025), says: "It is a fundamental principle of law that fraud must be clearly alleged and proven. Every presumption is in favor of innocence and not of guilt. *Engleby* v. *Harvey,* 93 Va. 445, 25 S. E. 225; *Shoemaker* v. *Chapman Drug Co.,* 112 Va. 612, 72 S. E. 121; *Johnson* v. *Lucas,* 103 Va. 36, 48 S. E. 497. But the citation of authority for so elementary a proposition is wholly superfluous."

Finally, it was attempted to set up a parol sale of the land and payment of the purchase money. No such case was made by the pleadings; and if enforceable (Code, section 2840), the admissible evidence in support of the contention is far too indefinite, vague and uncertain to warrant a decree thereon in favor of the plaintiffs.

Upon the whole case, we are of opinion that the decree of the circuit court is erroneous and must be reversed, and this court will enter a decree dismissing the bill.

Reversed.

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Staunton.

BRANSCOME v. CUNDUFF.

September 19, 1918.

1. MOOT QUESTIONS—*Appeal and Error.*—By a decree of the lower court appellant was "perpetually enjoined from practicing medicine and exercising his profession as a practicing physician within a radius of fifteen miles from Laurelfork." After the cause was argued and submitted in the Supreme Court of Appeals, appellant died. The issue upon which the cause came to the Supreme Court of Appeals became a purely moot question, and nothing remained for it to do except to enter an order dismissing the cause without costs to either party.
2. APPEAL AND ERROR—*Moot Questions—Costs.*—It was insisted by counsel for the appellant that in the instant case the controversy ought to be decided in order to settle the question of costs.

   Held: That the controversy in the case at bar having ceased to exist, leaving only moot questions, there could be no recovery for costs in the Supreme Court of Appeals, where such a judgment depends upon the substantial result of the litigation, and that the case must, therefore, be dismissed without costs to either party.

Appeal from a decree of the Circuit Court of Carroll county. Decree for complainant. Defendant appeals.

Dismissed.

The opinion states the case.

Wm. D. Tompkins and *Hooker & Hooker,* for the appellant.

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S. F. Landreth, B. P. Goad, D. W. Bolen and *W. S. Tipton,* for the appellee.

KELLY, J., delivered the opinion of the court.

On the 4th of October, 1915, Dr. E. L. Branscome, a physician residing and practicing medicine at Laurelfork, in Carroll county, sold and conveyed his home to Dr. S. A. Cunduff, another physician residing and practicing at that place. The deed expressed a money consideration of $2,250, and contained this further provision: "And for the same consideration the said Dr. E. L. Branscome agrees not to locate again within the radius of fifteen miles of Laurelfork, Virginia, as a practicing physician." Branscome moved away, but returned within a year from the date of the deed, took up his residence near Laurelfork, and resumed the practice of his profession. Cunduff thereupon brought this suit for an injunction. The result was a decree of the lower court whereby Dr. Branscome was "perpetually enjoined from practicing medicine and exercising his profession as a practicing physician within a radius of fifteen miles from Laurelfork." From this decree the present appeal was allowed.

Since the cause was argued and submitted in this court, Dr. Branscome has died. This fact is conceded by counsel representing both parties. The issue upon which the cause came to this court has, therefore, become a purely moot question, and nothing remains for us to do except to enter an order dismissing the case without costs to either party. This is the settled practice in this State and elsewhere generally. *Hamer* v. *Commonwealth,* 107 Va. 636, 59 S. E. 400; *Mills* v. *Green,* 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Elbon* v. *Hamrick,* 55 W. Va. 236, 46 S. E. 1029; 3 Cyc. 188, sub-sec. 4, and cases cited in note 82; 2 R. C. L., sec. 145, p. 169.

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It is insisted by counsel for the appellant that in this particular case the controversy ought to be decided in order to settle the question of costs, the amount of which is said to be considerable. The authorities above cited are decisively adverse to this contention. As was said by Judge Harrison in *Hamer* v. *Commonwealth, supra*, "the controversy in the case at bar having ceased to exist, leaving only moot questions, there can be no recovery for costs in this court, where such a judgment depends upon the substantial result of the litigation. The case must, therefore, be dismissed without costs to either party."

Dismissed.

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Staunton.

CATRON v. BOSTIC AND OTHERS AND HORTON v. BOSTIC AND OTHERS.

September 19, 1918.

1. CREDITORS' SUIT—*Bill Filed by Creditor of Decedent's Estate—Executors and Administrators.*—Where a bill is filed by a creditor of a decedent's estate, suing on his own behalf only, and the court orders an account of debts to be taken in the case, it becomes a creditor's bill upon the entry of the order, and the complainant loses his dominion over the suit.
2. EXECUTORS AND ADMINISTRATORS—*Debts of Decedent—Sale of Realty—Suit by Administrator.*—A bill charging that the personal estate of a decedent was insufficient to pay the decedent's debts, and praying for a sale of the real estate or so much thereof as might be necessary to pay the debts, cannot be maintained by an administrator.
3. EXECUTORS AND ADMINISTRATORS—*Debts of Decedent—Sale of Realty—Suit by Administrator.*—The administrator has nothing to do with the land, except to collect the rents accrued during the lifetime of the decedent, and he has no capacity to bring a suit to sell it. His concern is solely with the personal estate which it is his duty to administer. If that is not sufficient to pay the debts of the intestate, it is no concern of his administrator. The creditors have their remedy against the heirs to subject the real estate which is made assets for the payment of their debts by section 2665 of the Code of 1904, but the administrator has no such right. The real assets are not subject to be administered at the suit of the administrator of an intestate, in the absence of a statute conferring such right. In this State, the right to subject the real assets is expressly given to the creditor. It is not extended to the administrator of the intestate. Code of 1904, section 2668.
4. EQUITY — *Jurisdiction — Dismissal—Objections.*—Whenever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity

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is the want of jurisdiction in such case, and though the defendant took no notice of the defect but defended on the merits, and the case was heard and decided on the merits, the Supreme Court of Appeals will reverse and dismiss where there is such lack of jurisdiction.

5. CREDITORS' SUIT—*Debts of Decedent—Parties.*—If a bill be filed by a general creditor of a decedent for the purpose of subjecting his real as well as his personal estate, not only are the heirs necesary parties defendants, but the personal representative also.

6. CREDITORS' SUIT—*Debts of Decedent—Parties—Case at Bar.*—In the case at bar, the complainant was the personal representative of the decedent, but he was not brought before the court in that capacity. The widow of the decedent was entitled to dower in his real estate, and she and the decedent constituted a partnership, whose assets were sought to be subjected in the suit. She was, therefore, a necessary party as such surviving partner, and also in her individual capacity, as the bill asked for a sale of the land of which she was to be endowed.

7. APPEAL AND ERROR—*Judgments and Decrees—Presumption in Favor of.*—There is every presumption that a statement in a decree is correct.

8. CREDITORS' SUIT—*Parties.*—In a creditor's suit brought by one creditor, it is not necessary that all the other creditors be served with process, as such creditors are not necessary parties.

9. INFANTS—*Guardian Ad Litem—Creditors' Suit.*—Where infants were entitled to a share in a decedent's estate, and in the prayer of a bill by a creditor to subject the real estate of the decedent to his debts, it was asked that a guardian *ad litem* be appointed, but no names were given, no process was served on them, no guardian *ad litem* appointed, and no answer filed by or for them, their interests are unaffected by any proceedings in the cause.

10. DEMURRER—*Grounds of Demurrer—Code of 1904, Section 3271.*—Grounds of demurrer need not be stated unless required by some party to the cause or by the court.

11. PARTIES—*Irregularities in Procedure—Waiver.*—Where no objection is made to defect of parties or irregularities in the procedure, and such defects and irregularities do not affect the jurisdiction of the court or the ability of the court to do justice between the parties to the controversy, they will not be noticed by the court, and will be deemed to have been waived.

12. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Void or Voidable.*—A conveyance of land with intent and for the purpose of hindering and evading the vendor's creditors is not void, but void-

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able only. It is valid between the parties and neither can undo it without the consent of the other; but it is void as to the creditors of the vendor. In the absence of evidence of an intent by the purchaser to defraud his creditors, they cannot assail the transaction.

13. FRAUDULENT AND VOLUNTARY CONVEYANCES—*Absence of Fraud —Creditor of Purchaser.*—If there is no evidence of an intent on the part of the debtor to hinder, delay or defraud his creditors, they cannot assail a purchase of land by him, even though he made a bad bargain and agreed to pay more for the land than it is worth. In the absence of fraud, unsecured creditors cannot question the contracts of their debtors and undo all that is not beneficial to them.

14. BILLS, NOTES AND CHECKS—*Bona Fide Holder.*—The fact that the purchaser of notes before maturity purchased them for a sum considerably less than their face value, and attempted to get even a greater discount, did not charge the purchaser with knowledge of equities inhering in the notes.

15. BILLS, NOTES AND CHECKS—*Bona Fide Purchaser—Burden of Proof.*—The holding of a purchaser for value, before maturity, is *prima facie bona fide*, and the burden is on the party denying the *bona fides* of the transaction to prove his case, as the law will not presume fraud. Of course, the evidence may be circumstantial, but the proof of the existing circumstances amounting to implied notice must be clear.

16. BEST AND SECONDARY EVIDENCE—*Records.*—Testimony of witnesses as to suits pending in a sister State, and as to what had been done therein, is inadmissible, as the records of the court are the best evidence as to such matters.

17. PARTNERSHIP—*Sale of Individual Real Estate.*—The individual real estate of a partner cannot be subjected to partnership debts before the debts have been reduced to judgment, and it is error to decree a sale of such real estate to pay unsecured debts.

18. CREDITORS' SUIT—*Judicial Sales—Unsecured Debts.*—Real estate of a debtor cannot be sold to pay his unsecured debts. A court of equity has no such power.

19. RECORD—*Proceedings at Rules.*—The procedings at the rules are a part of the record of the court (Code of 1904, sections 3236 and 3237).

20. INFANTS—*Guardian Ad Litem.*—Where the interests of infants are concerned it must affirmatively appear from the record that a guardian *ad litem* was duly appointed. Where the record is silent on the subject, it will not be presumed.

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Appeal from a decree of the Circuit Court of Wise county. Decree for complainant. Defendants appeal.

Reversed.

The opinion states the case.

Irvine & Stuart and *Morison, Morison & Robertson,* for the appellants.

Bullitt & Chalkley, W. S. Mathews and *Geo. L. Taylor,* for the appellees.

BURKS, J., delivered the opinion of the court.

These are separate appeals from the same decree of the Circuit Court of Wise county, in a suit in chancery instituted by D. H. Bostic against Nelson P. Horton and others.

In March, 1914, W. H. Horton died intestate, leaving surviving him his widow, S. A. Horton, and several brothers and sisters as his only heirs at law. Shortly thereafter D. H. Bostic qualified as his administrator. At the time of his death Horton owned some real estate, but practically *no personal estate,* and was considerably indebted. The whole personal estate charged to the administrator consisted of "books in possession of administrator per appraisement $25.00." His debts reported in this cause amounted to $5,079.96. During his lifetime he and his wife were partners in a mercantile business under the style of S. A. Horton & Co. At the time of his death, the partnership owed debts amounting to about $3,700, and owned assets amounting to about $1,750. In June, 1914, D. H. Bostic who held a claim against W. H. Horton amounting to $26.00 and a claim against the firm of S. A. Horton & Co. amounting to $16.80, filed the bill in the cause which led to the decree from which these appeals were taken.

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The bill in this case is so inartificially drawn, and is such a departure from well recognized forms of procedure, that we have had great difficulty in determining its exact nature. Is it (1) a bill filed by the complainant as administrator of W. H. Horton, or (2) a bill filed by a creditor of a decedent's estate, suing on his own behalf only, or (3) a general creditor's bill? The distinction between the last two mentioned is immaterial, as an account of debts was ordered and taken in the case, and it became a creditor's bill upon the entry of the order, and the complainant then lost his dominion over the suit, even if it was his individual suit before that time. *Piedmont, etc., Life Ins. Co.* v. *Maury*, 75 Va. 508.

Some of the statements of the bill indicate that the complainant thought he was suing as administrator of W. H. Horton, for example, in the prayer for relief is the prayer, that "your orator's accounts as administrator of the said W. H. Horton, deceased," may be taken, stated and settled before a commissioner of the court, and yet "your orator" is D. H. Bostic, and neither as complainant nor defendant is he made a party as administrator of W. H. Horton. In speaking of certain partnership assets of the firm of S. A. Horton & Co., the bill charges that many of the "accounts are practically worthless and it will be impossible *for your orator to collect* (italics supplied) more than ten or fifteen per cent. of them." Other allegations of the bill are to the same effect, and apparently the case proceeded in the trial court on this theory. The bill charged that the personal estate was insufficient to pay the decedent's debts, and, after setting out the real estate of which intestate died seized and possessed, prayed for a sale thereof or so much thereof as might be necessary to pay the debts. Not only so, but "he asks that *he* be allowed to make either private or public sale of the same as in *his* judgment is most advantageous to the estate of his decedent, and will best conserve the interests of his widow, the said S. A. Horton, and his credi-

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tors." (Italics supplied.) No such bill could be maintained by the administrator of W. H. Horton. The administrator has nothing to do with the land, except to collect the rents accrued during the lifetime of the decedent, and he has no capacity to bring a suit to sell it. His concern is solely with the personal estate which it is his duty to administer. If that is not sufficient to pay the debts of the intestate, it is no concern of his administrator. The creditors have their remedy against the heirs to subject the real estate which is made assets for the payment of their debts by section 2665 of the Code, but the administrator has no such right. The real assets are not subject to be administered at the suit of the administrator of an intestate, in the absence of a statute conferring such right. In this State, the right to subject the real assets is expressly given to the creditor. It is not extended to the administrator of the intestate. Code, section 2668. Hence, the bill cannot be maintained by the administrator. *Brewis* v. *Lawson,* 76 Va. 41; *Litterall* v. *Jackson,* 80 Va. 604; *Pierce* v. *Jackson,* 85 Va. 227, 235, 7 S. E. 189. Furthermore, if the bill be regarded as a bill by the administrator of W. H. Horton, it is without equity to support it, and whenever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity is the want of jurisdiction in such case, and though the defendant took no notice of the defect but defended on the merits, and the case was heard and decided on the merits, this court will reverse and dismiss where there is such lack of jurisdiction. *Morgan* v. *Carson,* 7 Leigh (34 Va.) 238; *Hudson* v. *Kline,* 9 Gratt. (50 Va.) 379, 386. There are other objections to the bill, treated as a bill by the administrator, but we have stated sufficient.

If the bill be regarded as a bill filed by Bostic, in his in-

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dividual capacity and as a creditor of W. H. Horton, it is also subject to serious objection. If a bill be filed by a general creditor of a decedent for the purpose of subjecting his real as well as his personal estate, not only are the heirs necessary parties defendants, but the personal representatives also. *Johnston* v. *Pearson*, 121 Va. 453, 93 S. E. 640. In the case at bar, the complainant was the personal representative of W. H. Horton, but he is not brought before the court in that capacity. The widow of Horton was entitled to dower in his real estate, and she and W. H. Horton constituted the firm of S. A. Horton & Co., whose assets were sought to be subjected in the suit. She was therefore a necessary party as such surviving partner, and also in her individual capacity, as the bill asked for a sale of the land of which she was to be endowed. The decree complained of states that "S. A. Horton is a proper party to this suit; she is a party thereto and has been duly served with process." There is every presumption that this statement of the decree is correct, but we have been unable to verify it from the record before us. The complainant attempted to make all creditors of W. H. Horton and of the firm of S. A. Horton & Co. parties defendant, but several of them were not served with process. This was immaterial as such creditors were not necessary parties. The children of M. D. Horton, who was a brother of W. H. Horton, were entitled to a share in the latter's estate. Their names were given at or near the commencement of the bill, and they are asked to be made defendants in the prayer, and that a guardian *ad litem* be appointed for them in the following language: "* * * and the following children of M. D. Horton, all of whom are infants under the age of twenty-one years, and for whom a guardian *ad litem* is prayed to be appointed," but no names are given, no process was served on them, no guardian *ad litem* appointed, and no answer filed by or for them. This was manifest error, and their inter-

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ests are unaffected by any proceedings in the cause. *Turner* v. *Barraud*, 102 Va. 324, 46 S. E. 318. The bill nowhere directly alleges that W. H. Horton, or anyone else is indebted to the complainant, or that he is seeking to enforce a liability of any kind against anyone, but on examination we find in the lists of creditors filed and also enumerated in the bill that the complainant or some one of the same name, holds a claim against the estate of W. H. Horton, amounting to $26.00, and a claim against S. A. Horton & Co. amounting to $16.80. There is nothing in the bill, or in the evidence, save this identity of names, to show that the complainant in his individual capacity, has or is asserting any demand against the estate of W. H. Horton or the firm of S. A. Horton & Co., nor is there any prayer in the bill that these or any other debts be paid out of any particular assets, or that they be paid at all, unless the prayer for general relief be sufficient for that purpose. There was no appearance for any of the defendants, except Nelson Horton, who demurred to the bill, and also answered denying many of its material allegations. The demurrer was in writing, but did not state the grounds thereof. Appellees insist that it is of no value because the grounds were not stated. In this they are in error. Grounds of demurrer need not be stated unless required by some "party thereto" or by the court. In this case they were not called for. Code, section 3271.

Notwithstanding these defects, the trial court proceeded with the case without any objection on the part of anyone, except the demurrer aforesaid. The case was referred to a master to take, state and settle the accounts of D. H. Bostic as the administrator of W. H. Horton, deceased, to ascertain and report the debts against the estate of the said W. H. Horton and S. A. Horton & Co., to ascertain and report what real estate W. H. Horton died possessed of, and where located, what real estate is owned by S. A. Horton & Co.

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liable to the debts of said S. A. Horton & Co., and any other matter deemed pertinent by the master, or required by any of the parties. While the case was pending before the master, there developed the controversy which gave rise to the present appeals.

J. H. Catron laid before the master four negotiable notes for $1,000 each, made by W. H. Horton, payable to Nelson P. Horton, endorsed in blank by him and his wife, Ibbie Horton, and of which Catron claimed to be the *bona fide* holder in due course, and which he asked to have allowed to him as a debt against the estate of W. H. Horton. The allowance of this claim was vigorously resisted by the administrator of W. H. Horton and by his creditors, who employed separate counsel. This was the only matter contested in the suit. While the case was pending before the master, S. A. Horton gave her deposition in which she stated that she was only a nominal partner in the firm of S. A. Horton & Co., and that all of the business and assets of the firm really belonged to her husband, W. H. Horton. All of the personal assets of the firm were taken over and reduced to cash by Bostic as administrator of W. H. Horton, without objection from any source. The master stated and reported to the court an account between D. H. Bostic, administrator of W. H. Horton, and the firm of S. A. Horton & Co.; an account of the transactions of Bostic as administrator of W. H. Horton; an account of debts against the firm of S. A. Horton & Co.; an account of debts against W. H. Horton; a statement of the real estate whereof W. H. Horton died posessed; and a statement of the real estate whereof S. A. Horton was possessed. As to debts against W. H. Horton, deceased, the master reported in favor of Catron, but, on exceptions to his report, the claim was disallowed and rejected, and from this decree separate appeals were allowed to Nelson P. Horton and J. H. Catron.

Notwithstanding all the defects and irregularities here-

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inbefore pointed out, the bill must be regarded as a creditor's bill by Bostic to settle up the estate of W. H. Horton and subject his personal and real estate to the payment of his debts, and although Bostic as administrator of W. H. Horton was not before the court, his absence will be deemed to have been waived by the parties, and the master's report of the transactions of D. H. Bostic as administrator of W. H. Horton and in connection with assets of S. A. Horton & Co., will be accepted as an agreed statement of the correctness of those accounts, as no objection thereto or to other irregularities was interposed either in the trial court or in this court. The Catron debt has been fully investigated, and the parties have had a full and fair hearing on the merits. They are not now making any objection to defect of parties, or irregularities in the procedure, and as such defects and irregularities do not affect the jurisdiction of the court or the ability of the court to do justice between the parties to this controversy, they will not be noticed by the court, and will be deemed to have been waived.

In July, 1912, Nelson P. Horton killed his nephew, Charles Horton, and in the same altercation unintentionally killed his brother, M. D. Horton, generally spoken of by the witnesses as "Mack Horton." The altercation took place in the State of Tennessee, where the parties then resided. He was tried and acquited for killing his nephew, but for the killing of his brother he was found guilty of involuntary manslaughter and sentenced to confinement in the penitentiary of Tennessee for a period of one year. The case was appealed, but the judgment of the trial court was affirmed and he was sent to the penitentiary in November, 1913. At this time Nelson P. Horton owned a farm of 160 acres, upon which he resided, in Hancock county, Tennessee. At the same time his brother, W. H. Horton, was engaged in the mercantile business with his wife, under the style of S. A. Horton & Co., at Big Stone Gap, Virginia.

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After the killing, but before the trial of Nelson P. Horton, it is claimed by Nelson that he negotiated a sale of his farm to W. H. Horton at the price of $6,000, but the deed was not made until after his trial and conviction. He claims that $2,000 of the purchase money was to be paid in cash, and that four notes were to be given of $1,000 each, payable two years after date, with interest at six per cent., and that these notes were to be paid by the sale to him of the business of S. A. Horton & Co. at Big Stone Gap. Three negotiable notes of $1,000 each were executed and delivered by W. H. Horton, each dated November 20, 1912, payable two years after date. It is claimed that the fourth note was not given at that time because they had only three blank notes, but the fourth note for $1,000 was afterwards executed, bearing date November 17, 1913, payable one year after date, with interest. It was at one time claimed that this fourth note was a forgery, but this claim was subsequently abandoned. The notes were all negotiable. They were endorsed and delivered by Nelson P. Horton, without consideration, to his wife, Ibbie Horton, and it is claimed by Catron and Nelson P. Horton that Ibbie Horton, subsequently and before the maturity of said notes, for the consideration of $3,200, endorsed and delivered all four of said notes to Catron, who is a *bona fide* holder thereof for value in due course, and is entitled to collect the same. The sale of the stock of S. A. Horton & Co. to discharge said notes it is alleged did not take place on account of the death of W. H. Horton in March, 1914, while Nelson was still in the penitentiary. The present suit was brought in June, 1914. The answer of N. P. Horton was filed and the decree for the account entered at the October term, 1914, of the court, and the transfer of the notes to Catron was made somewhere between the 14th and 20th of November, 1914. On the other hand it is claimed by the administrator and the creditors of W. H. Horton that this whole transaction was

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a mere sham and a device on the part of Nelson P. Horton to defeat his creditors, and that W. H. Horton participated therein; that Nelson feared suits for damages by the widows of the two men he had killed, and that this device was resorted to by him and W. H. Horton "to save Nelson from being broke up;" that Catron had both constructive and actual notice of the pendency of this suit, and that he was not a *bona fide* holder in due course, and could not recover on said notes. The deed from Nelson P. Horton to W. H. Horton expressed the consideration as "$4,000 cash in hand paid, the receipt of which is hereby acknowledged." The bill does not expressly charge any fraud in the transaction, but does allege that $4,000 was the true consideration of the deed; that Nelson P. held the notes of his brother for $3,000; that the latter had mortgaged the land for $2,000 to a bank at Rogersville, Tenn., which had been turned over to Nelson P. by his brother, and that the $3,000 of notes held by Nelson P. should be credited by the $2,000 paid thereon as aforesaid. The findings of the master on these questions were as follows:

"1. That the purchase price of said tract of land was $6,000, represented by the said four notes of $1,000 each, and the said $2,000 note of N. P. Horton, which was to be assumed and paid by W. H. Horton.

"2. That the note for $1,000 bearing date of November 17, 1913, was signed by W. H. Horton, and that the signature is genuine.

"3. That the conveyance of the said tract of land was made with the intent for the purpose of evading and hindering the collection of damage claims by Mrs. Charlie Horton and Mrs. Mack Horton against N. P. Horton for the killing of their respective husbands, actions for which the said N. P. Horton expected to be instituted against him.

"4. That W. H. Horton had knowledge of and participated in the said intent and purpose of N. P. Horton in the conveyance of said tract of land.

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"5. That the notes were assigned by N. P. Horton to Ibbie B. Horton, his wife, without consideration.

"6. That the circumstances attending the negotiations between N. P. Horton and his wife and J. H. Catron for the purchase of said notes by J. H. Catron should have aroused the suspicions of said Catron; that the undersigned is not satisfied that he made such inquiry into the circumstances of the conveyance of said tract of land as it was his duty to do, and that he is affected with notice of any infirmities that may exist in the said notes by reason of the character of the conveyance of said land by N. P. Horton to W. H. Horton. However, the undersigned is of the opinion that it would not be competent for W. H. Horton, if he were living, to avoid the payment of these notes on the ground that they were executed for the purchase price of land conveyed to him in fraud of N. P. Horton's creditors; that the policy of the law to discourage transactions of such character would be best subserved by compelling W. H. Horton to pay these notes; and the undersigned is of the opinion that the estate of W. H. Horton, and the creditors thereof, stand in his shoes with respect to such defense against the notes in question. For this reason, the undersigned has allowed this debt."

Sundry exceptions were filed to the master's report, but they are quite lengthy and need not be set out in full, as the ruling of the trial court thereon will sufficiently disclose their purport. The trial court held that the sale of the land by Nelson P. Horton to W. H. Horton was "a fraudulent transaction," made with intent to defraud and deceive "both the then existing and prospective creditors of the said N. P. Horton," and *the said W. H. Horton and S. A. Horton & Co.*, and that the latter have the right to contest the payment of said notes in this suit. Nelson P. Horton owed comparatively few debts at the time, but the evidence tends strongly to prove that he was apprehensive about

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these damage suits, and that the transaction was intended to defeat any judgment that might be recovered on that account. Indeed, all the testimony on behalf of the administrator and creditors of W. H. Horton was directed to this point. The record contains no evidence of an intention on the part of W. H. Horton to defraud his individual creditors or the creditors of S. A. Horton & Co. While the testimony as to the intent to defraud the creditors of Nelson P. Horton is conflicting, we may assume for our present purposes that such intent existed, and was sought to be carried out by the sale aforesaid. This did not render the transaction void, but voidable only. It was valid between the parties and neither could undo it without the consent of the other, nor would the courts lend their aid to either in undoing it; but it was void as to the creditors of Nelson P. Horton. See sections 2458 and 2472 of the Code. The instant case is very similar, in some of its aspects, to the case of *Harris* v. *Harris' Ex'r*, 23 Gratt. (64 Va.) 737. In that case, a young man who had been an impressing officer of the Confederate government, shortly after the war, was apprehensive of the results of suits which had been brought against him, and of the recovery of damages for acts done by him during the war as such officer. In order to defeat such recovery, he executed a number of bonds to his father for large amounts under an agreement between them that if no trouble arose from this quarter the father would redeliver the bonds to the son. No such trouble did arise, but the father died in possession of the bonds, and suit was brought thereon by his executor. The son sought to set up the agreement aforesaid in bar of recovery, but this court held that the bonds were valid obligations, as between the parties, and applying the maxim, *nemo allegans suam turpitudinem est audiendus,* refused to permit the defense. It was further held that the contract was not void *ab initio.* It was void only as to third persons, and the law, upon

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grounds of public policy, makes it valid between the parties. So, in the case in judgment, the transaction was valid between the parties and the law will not lend its aid to either, but will leave the parties where it found them. As to creditors of Nelson Horton, however, the transaction is void as it was made to hinder, delay and defraud them. But this is not true of the creditors of W. H. Horton. Evidence of an intent to defraud the creditors of Nelson P. Horton is not evidence of an intent to defraud the creditors of W. H. Horton, or of S. A. Horton & Co. Quite the contrary. Apparently, W. H. Horton, and thereby indirectly his creditors, was to be benefited at the expense of the creditors of Nelson P. Horton, and that is the theory of the evidence offered. If there was no evidence of an intent on the part of W. H. Horton to hinder, delay or defraud his creditors (and there was none) they cannot assail the transaction even though he made a bad bargain and agreed to pay more for the land that it is worth. In the absence of fraud, unsecured creditors cannot question the contracts of their debtors and undo all that is not beneficial to them.

It is true that section 2458 declares that contracts like the one under consideration shall, "as to such creditors, purchasers or other persons" be void, but as was said in *Ratliff* v. *Ratliff*, 102 Va. 880, 885, 47 S. E. 1007, 1009: "this section, as well as the unvarying decisions of this court, however, declare that, as between the parties, such a writing shall be binding and valid." The statute does not expressly declare that the contract shall be valid between the parties, but it does so declare by necessary implication when it names the classes of persons who may assail it. The expression of one was the exclusion of the others. Neither W. H. Horton nor his administrator could avoid the transaction. It was not void *ab initio*, and section 2458 of the Code, as we have seen, declares who may avoid it. Amongst others who may avoid the transaction are "credi-

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tors," but whose creditors? This question is answered by section 2472 of the Code, which appears in the same chapter with section 2458. It is there declared that "the word 'creditors,' where used in any previous section of this chapter, shall not be restricted to the protection of creditors of * * * the grantor, but shall extend to and embrace all creditors * * * who but for the deed or writing would have had * * * a right to subject it to their debts." In the instant case, if no deed had been made by Nelson P. Horton to W. H. Horton, the creditors of the latter would clearly have had no pretense of a right to subject the lands of Nelson P. to the payment of their debts, and hence are not within the terms of the statute. It seems equally clear that the "other persons" mentioned in the statute must have been likewise prejudiced before they could assail the transaction.

The language of Judge Staples in *Henderson* v. *Hunton*, 26 Gratt. (67 Va.) 926, 933, with reference to deeds void *ab initio*, quoted by counsel for the appellees, was used in a case in which no such deed was in controversy, and is inapplicable to a case of this kind. Furthermore, it is manifest that Judge Staples could never have intended the language used in *Henderson* v. *Hunton* to apply to a case of this kind, as he was a member of the court and concurred in the opinion in *Harris* v. *Harris' Ex'r*, *supra*, holding transactions of this nature good between the parties and not void *ab initio*.

It would render this opinion too long to cite authorities on this subject from other States. The law is well stated, and authorities cited in the notes in 12 Ruling Case Law, section 7, page 473, as follows: "The wording of the statutes 13 and 27 Elizabeth, and of nearly all those patterned after them in this country, is that the conveyances prohibited shall be 'utterly void.' The literal meaning of the language used would render the covinous deed void, not only as to

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the persons intended to be defrauded, but also as to strangers, and even the grantor himself. But the unanimous verdict of the decisions is that a voluntary or a fraudulent conveyance is valid between the parties, and in fact as to the whole world, except those within the protection of the statutes, that is, the word 'void' in the statutes has been uniformly construed to mean 'voidable,' and 'voidable' only at the instance of those embraced within the meaning of the terms 'creditors and others' or 'purchasers.' Consequently the expression so often used, that a fraudulent transfer is void against creditors, simply means that the rights of creditors as such are not, with respect to the property, affected by the transfer; but that creditors may, notwithstanding the transfer, avail themselves of all the remedies for collecting their debts out of the property, or its avails, which the law has provided in their favor, and that in pursuing those remedies they may treat the property as though the transfer had not been made, that is, as the property of the debtor. The transfer is good, however, against even creditors, unless they protect themselves by pursuing that prescribed course by which alone the property can be made available for the satisfaction of debts." See also a very full note in 3 Am. St. Rep. 727-745.

If the contract between Nelson P. Horton and W. H. Horton for the sale of the Tennessee land was provisional only, and their agreement was that the notes given for deferred payments were to be paid *only* by the delivery of the stock of goods of S. A. Horton & Co. at Big Stone Gap, it may be that the notes could not have been asserted as debts against the general estate of W. H. Horton, deceased, had they been non-negotiable. But the notes were negotiable and transferred for value, in due course, before maturity. It is true that the notes were of the face value of $4,000, and were purchased for $3,200, but the holder testifies that he knew that Nelson Horton "needed money," and

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he was apparently trying to get even a greater discount, although he says, "I thought the notes were worth one hundred cents to the dollar in gold when I bought them." This fact alone, of course, did not charge Catron with knowledge of equities inhering in the notes. Being a purchaser for value, before maturity, his holding was *prima facie bona fide*, and the burden was on the party denying the *bona fides* of the transaction to prove his case, as the law will not presume fraud. Of course, the evidence may be circumstantial, but the proof of the existing circumstances amounting to implied notice must be clear. *Andrews* v. *Fidelity Co.*, 103 Va. 196, 204, 48 S. E. 884. In the case in judgment, we do not regard the evidence sufficient to overcome the *prima facie* presumption of *bona fides* created by the purchase for value, in due course, before maturity. We do not question the correctness of our conclusion in *Andrews* v. *Fidelity Co.*, *supra*, where actual notice was shown, and *Piedmont Bank* v. *Hatcher*, 94 Va. 229, 26 S. E. 505, where the holder of the paper was chargeable with notice of fraud in the inception of the paper. The circumstances proved in the latter case were very much stronger than in the case in judgment where the chief reliance is upon the testimony of interested parties as to alleged statements of Catron which he denies.

Our conclusion is that so much of the decree of the Circuit Court of Wise county as holds that the notes held by J. H. Catron, and proven in this case, are void and not enforceable against the estate of W. H. Horton, is erroneous. This conclusion renders it unnecessary to consider several other questions of interest discussed in the briefs of counsel.

Something was said in the testimony of some of the witnesses who testified in this case about one or more suits pending in Tennessee by creditors of Nelson P. Horton to set aside the deed made by him to W. H. Horton, and as to what had been done therein and the present status thereof; but such matters cannot be shown by such testimony. The records of the Tennessee court are the best evidences thereof.

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As the case has to be remanded, there is another error in the decree to which attention is called so that it may be corrected. While S. A. Horton was at least an ostensible partner of the firm of S. A. Horton & Co., and as such liable for its debts, her individual real estate cannot be subjected thereto before the debts have been reduced to judgment, and it was error to decree a sale of such real estate to pay unsecured debts. Real estate of a debtor cannot be sold to pay his unsecured debts. A court of equity has no such power.

As the record before us does not furnish any evidence of the appointment of a guardian *ad litem* for the infant defendants, we supposed this would appear from the proceedings at the rules, and we requested the clerk of the Circuit Court of Wise county to furnish us with the proceedings at the rules. In reply to this request he says: "I cannot say just now just how the case was placed on the docket; the first decree states that the cause had properly matured at rules, although I cannot find any record." The proceedings at the rules are a part of the record of the court (Code, sections 3236, 3237), and where the interests of infants are concerned it must affirmatively appear from the record that a guardian *ad litem* was duly appointed. Where the record is silent on the subject, it will not be presumed. In the cases at bar, it does not appear from any proceedings at the rules, or from any decree in the cause, or otherwise, that any guardian *ad litem* was appointed for the infant defendants. See *Jeffries* v. *Jeffries, Ex'r*, 123 Va. 147, 96 S. E. 197; *Turner* v. *Barraud*, 102 Va. 324, 46 S. E. 318; *Alexander* v. *Davis*, 42 W. Va. 465, 26 S. E. 291; Burks' Pl. & Pr., section 192.

For the errors aforesaid, the decree of the Circuit Court of Wise county must be reversed, and, in order that the necessary parties may be brought before the court, and the

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cause proceeded in more regularly, the said circuit court should require the complainant to amend his bill so as to make D. H. Bostic, administrator of W. H. Horton, deceased, S. A. Horton in her own right and as surviving partner of herself and W. H. Horton, late merchants and partners doing business under the style and firm name of S. A. Horton & Co., and the infant children (naming them) of M. D. Horton, parties defendants, and a proper guardian *ad litem* should be appointed for said infants. When the case is matured upon amended pleadings, a proper decree can then be made therein in conformity with this opinion.

Reversed.

SIMS, J., dissenting:

I agree with what is said in the majority opinion as to these causes being construed to be a creditors' suit; as to the further proceedings which should be had therein, with respect to parties; and with what is said in the majority opinion as to the necessity of the liability of S. A. Horton being reduced to judgment (or of some lien thereafter being fixed on her real estate), before such real estate can be decreed to be sold.

I also agree with the conclusion stated in the majority opinion that the deed from Nelson P. Horton to W. H. Horton, although fraudulent as to the creditors of the former, could not be set aside as fraudulent and void as against the creditors of the latter, because even if the property conveyed were within the jurisdiction of the court below there is an entire absence of proof in these causes of such fraudulent intent attending the execution of such deed.

But while this is true, I do not think it follows that the payment of the notes in question, given by W. H. Horton to Nelson P. Horton, for the deferred payments of purchase money for the land conveyed by said deed, can be enforced

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against the estate of W. H. Horton to the detriment of others who are creditors of such estate. That question, I think, depends upon what was in fact the understanding and agreement between Nelson P. Horton and W. H. Horton at the time such notes were given as to the character and extent of the obligation of such notes.

These causes do not involve the setting aside of the deed aforesaid. The court below had no jurisdiction, indeed, so to do, the land conveyed being in another State. And they do not in any aspect, accurately speaking, involve the question whether said deed was or was not fraudulent and void *as against the creditors of W. H. Horton;* but the question does arise incidentially, whether such deed was or was not in fact, in accordance with the true intention of the parties thereto, a mere camouflage, a mere semblance of a sale and purchase which did not then in truth occur. The pivotal question is whether the said notes were intended by the parties thereto to be and were executed and delivered as the unconditional personal obligations of the said W. H. Horton.

The testimony in these causes, when read in the light of the circumstances which surrounded said brothers as disclosed by the record, clearly satisfies my mind that said notes were not intended by either of said brothers, when they were executed and delivered, to create unconditional personal obligations of W. H. Horton to Nelson P. Horton. It was clearly not then intended by either of them that such notes were ever to pass out of the hands of Nelson P. Horton, except to be returned to W. H. Horton. Nelson P. Horton himself states that the agreement between him and his said brother, when the notes were given, was that he (Nelson P. Horton) "* * * was buying the store," (of W. H. Horton), "was going to take charge of it;" and in answer to the question, "How were you to pay for it?" answered, "In those notes." (Record, page 129.) I think the pre-

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ponderance of the evidence establishes that what W. H. Horton said to his wife in reference to the deed of trust which she was induced to execute, namely, "Mrs. Horton, it does not involve anything of ours," also characterizes the true nature of said notes in accordance with the mutual intention of both of said brothers when the notes were given, and that such intention continued so long as W. H. Horton was living (record, page 211). I think the testimony of Thos. L. Horton (record, page 77), Will Frazier (record, page 105), Nelson P. Horton (record, pages 128, 139), Hester Horton (record, page 169), and S. A. Horton (record, pages 206, 211), establishes by a preponderance of the evidence that, notwithstanding the execution and delivery of said deed, the real estate thereby conveyed, as between Nelson P. Horton and W. H. Horton, was still to be considered to be and was the property of Nelson P. Horton, and was intended to continue to remain his until such time as Nelson P. Horton should be liberated from his troubles in Tennessee. That it was agreed between the brothers that when so liberated Nelson P. Horton would come to Big Stone Gap and then buy the stock of goods of W. H. Horton there; and that, if W. H. Horton had not meanwhile sold said real estate for the benefit of Nelson P. Horton, the said W. H. Horton would then take said real estate in exchange for said stock of goods upon a purchase then to be made—the value of the stock of goods to be then ascertained by inventory of it (see Nelson P. Horton's statement as to inventory, page 129, record); and that in such case the notes aforesaid were to be delivered up to W. H. Horton by Nelson P. Horton. That purchase of the stock of goods and actual transfer of the ownership of said real estate never took place on account of the death of W. H. Horton.

That is to say, the said notes were not absolute but conditional obligations. The condition upon which they were

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to become absolute was the subsequent purchase by Nelson P. Horton of said stock of goods. That condition was never performed.

Therefore, as between Nelson P. Horton and W. H. Horton, the said notes never were or became valid and binding obligations of the latter to the former. And since the creditors of W. H. Horton stand in his shoes, the same is true as to them, and such notes are not binding obligations against W. H. Horton's estate, unless made so by their having come into the hands of a *bona fide* holder thereof for value, unaffected with notice of their true character.

As to the latter question:

The notes were entrusted by W. H. Horton to the keeping of his said brother. The evidence shows clearly that the notes were so entrusted to Nelson P. Horton for the fraudulent purpose, it is true, of deceiving certain parties in the event that they should sue and obtain judgment or judgments against the latter. But those parties never sued or recovered such judgments, are not before the court in these causes, and the notes were not entrusted to Nelson P. Horton to be by him in any event sold or assigned to any one. It was practically a year after such notes were given him, and some eight months after the death of W. H. Horton, that Nelson P. Horton first conceived the purpose or design to sell the notes before maturity. W. H. Horton was no party to such purpose or design, and it was consummated by Nelson P. Horton in fraud of the rights of W. H. Horton, as fixed by the understanding between the two brothers aforesaid, and hence it would have been in fraud of W. H. Horton had he been then living, and, being after his death, was in fraud of the creditors of the latter. It was from such fraudulent transfer of said notes that the threatened injury to such creditors arises; not from their original execution and delivery to Nelson P. Horton, or from the execution and delivery of said deed. Had the latter kept

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faith with his brother and retained such notes in his hands for such purpose only as that for which they were given, the controversy in these causes over their validity as obligations against the estate of W. H. Horton could never have arisen. That that purpose was fraudulent is therefore immaterial in these causes. And since W. H. Horton was not a party to such fraudulent transfer, no question of his being *in pari delicto* can properly arise or affect the question we have under consideration.

Now, upon the question whether the appellant, J. H. Catron, was a *bona fide* purchaser for value of said notes without notice of their true character:

It is not clear from the evidence whether one of the notes was or was not past due when bought by said Catron. But if we assume that none of them were past due when such purchase was made, yet they were bought after the death of W. H. Horton, when his estate was believed to be solvent, at such a large discount (being $800 on a total principal of $4,000, or one-fifth thereof), and under such other circumstances attending the negotiations for the purchase as should have aroused the suspicion of said Catron and put him upon inquiry; and, on well settled principles, Catron had constructive notice of the real character of and infirmity in the notes aforesaid, when he purchased them—as the commissioner in these causes in substance found by his report and as the decree complained of held. See Code, sec. 2841-a, subsec. 52, cl. 4; *Piedmont Bank* v. *Hatcher*, 94 Va. 229, 231, 26 S. E. 505; *Andrews* v. *Fidelity Co.*, 103 Va. 196, 204, 48 S. E. 884.

That the bill does not allege or tender the issue that said notes were not in fact valid personal obligations of W. H. Horton is immaterial, it being a general creditors' suit, since the practice is well established that creditors, whose debts are reported or asserted before a commissioner acting under a decree of reference for the ascertainment of debts, may

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make defenses and obligations to other claims asserted as debts before the commissioner which are not made in the bill, and that such defenses and obligations do not require formal pleadings but may be put in issue by notice given during the taking of depositions, or before the commissioner or court, in any manner which is sufficient to substantially raise the issue before the commissioner or the court; and the issue may be raised before the court for the first time by an exception or exceptions to the commissioner's report. The latter was done by appellants, creditors of the estate of W. H. Horton, by their exceptions to the commissioner's report in these causes.

For the foregoing reasons, I am of opinion that there was no error in the decree complained of, in so far as it held that said notes are not enforceable against the estate of W. H. Horton, and to that extent, as I think, it should be affirmed.

For the foregoing reasons, I am constrained to dissent from the majority opinion.

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Staunton.

CATRON v. NORTON HARDWARE COMPANY AND CATRON v. A. L. P. CORDER AND COMPANY.

September 19, 1918.

1. MULTIFARIOUSNESS—*Attachment in Equity—County as Garnishee—Case at Bar.*—The instant suits were attachments in equity, brought by complainants, who had furnished materials and supplies used in the construction of a road, to a subcontractor, against the contractor. There was a provision in the contract between the contractor and the county, that the county should retain a sufficient amount of the contract price to pay any claims against the contractor by subcontractor and materialmen. The bill was demurred to on the ground of multifariousness because the county was made a defendant.

   Held: That the county was made a defendant simply as a garnishee, and under the allegations of the bill was a proper party, and that the demurrer was, therefore, properly overruled.

2. ISSUES TO JURY—*Discretion of Court—Appeal and Error—When Error to Refuse.*—While directing an issue to be tried by a jury is a matter of discretion with a court of equity, it is not an arbitrary discretion, but one to be exercised upon sound principles of reason and justice. A mistake in its exercise is just ground of appeal, and the appellate court will determine whether or not it has been properly exercised in a given case. It is error to direct an issue when it should not have been exercised, and it is equally error to fail to direct one when it should have been directed. The object of the issue is to inform the conscience of the chancellor, and for this purpose he may direct it, though not requested by either party.

3. APPEAL AND ERROR—*Respect Due to Decree of Trial Court—Issues to Jury—Depositions.*—The decree of the trial court is entitled to great respect, and is generally presumed to be right, but where the evidence was not taken before the trial court, but by depositions, and is conflicting, and involves not only the question of the credibility of the witnesses but the charge of fraud on the part of some of the parties who have testified in the cause, it is peculiarly a case for an issue to be tried by a jury, and if the chancellor has failed to order it, though not requested by the parties, his decree will be reversed.

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4. ISSUES TO JURY—*Appeal and Error—Affirmance—Case at Bar.*—In the instant suits a majority of the court were of the opinion that there was sufficient evidence in the record to sustain the decree of the trial court in each of the cases, and that no issue out of chancery was necessary.

Appeals from a decree of the Circuit Court of Wise county. Decree for complainants. Defendant appeals.

Affirmed.

The opinion states the case.

E. M. Fulton, for the appellant.

Bond & Bruce and *Vicars & Peery,* for the appellees.

BURKS, J., delivered the opinion of the court.

These two cases were attachments in equity and were heard together in the trial court.

J. H. Catron had contracted with the county of Wise to construct a number of miles of public road, and the contract contained the following provision:

"It is agreed as a part of this contract that if at any time or times any claim or claims shall be made to the party of the second part by a subcontractor or laborer or other person for any money due for any work, labor or material done upon or supplied upon the work herein contracted for, done for, furnished or supplied to the party of the first part, that the party of the second part may retain a sufficient amount to pay the same, when said claim shall thereafter be established in court, and such amount is hereby assigned to said party of the second part to pay such claim or claims, such payments to be made when so established."

It is claimed that Carrier was a subcontractor under

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Catron for three miles of this road, that he is largely indebted to the complainants, that he is a non-resident, that Catron is indebted to Carrier, that the debts due the complainants are claims such as are provided for in the contract between Catron and Wise county, and that the county is indebted to Catron under his contract aforesaid. Carrier, Catron and Wise county are made defendants.

The record is in some respects incomplete. No attachment or order to attach appears anywhere in the record, and if the county of Wise entered any appearance at all, the record does not disclose the fact. There was a demurrer to the bill in each case, which was overruled. The Corder case was referred to a master to make certain inquiries. He made his report to which it is said exceptions were filed, but there are no exceptions in the record. No order of reference was made in the other case, though the inquiries were as pertinent in the one case as the other. This, however, is immaterial as the court could have gotten the facts from the record.

The cases were heard together and there was a separate decree in favor of each complainant for the amount of his debt against Catron and Wise county, but no decree against Carrier. It is presumed that Carrier was proceeded against as a non-resident, but the record is silent on the subject. He appeared in the State and was examined as a witness for the complainants and was cross-examined at length and there was ample opportunity to serve process on him. He was in effect, by his testimony, prosecuting the cases against Catron.

The errors assigned are the overruling of the demurrer, and the lack of evidence to support the decree. The ground of the demurrer was multifariousness because the county of Wise was made a defendant. The county of Wise was made a defendant simply as a garnishee, and under the allegations of the bill was a proper party. The demurrer, therefore, was properly overruled.

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Whether the decrees were right on the merits cannot be ascertained from the record. On July 10, 1913, Catron prepared a writing which is signed by Carrier but not by Catron, from which it appears that Catron sublet to Carrier miles five, six and seven for construction, on certain terms therein set forth. This writing contains the following provision: "Carrier is to begin work on ..... day of August, and contract is to be drawn later to conform with the contract that said Catron is under with county supervisors." Catron explains that this was a mere memorandum to show that Carrier was to be allowed to get those miles for construction. Although the writing stated that Carrier was to "begin work on the ..... day of August," he actually began work shortly after the date of the writing, probably about July 15th or 16th. On July 18, 1913, the formal contract in writing was prepared and executed by Catron and Carrier. At that time it was expected that a third person would unite with Carrier in the contract for the work and a blank is left for his name throughout the contract. This contract contains the following provision as to a bond to be executed by Carrier and his associate:

"Now in order to insure the faithful performance of each and every condition and stipulation and requirement made by this contract and to indemnify and save harmless said J. H. Catron, from any and all damages either directly or indirectly arising out of any failure to perform the same the party of the first part is to execute and deliver herewith a bond in the penalty of six thousand dollars ($6,000) conditioned for such faithful performance of such conditions, stipulations and requirements with surety or sureties satisfactory to the said J. H. Catron. The further stipulations in contract between the board of supervisors of Wise county, Virginia, and John H. Catron, as heretofore mentioned and made a part as aforesaid of this contract and are agreed and assented to by both the parties hereto a copy

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or said contract proposals specifications and etc. will be procured and attached hereto and made a part hereof."

The record shows that Catron insisted on the bond, and that an unsuccessful effort was made by Carrier and his intended associate to give it. This situation continued about thirty days. During this time Carrier was at work on the road with a force of twenty-five hands and equipment and tools, and did work which, if charged at the contract price for the whole, amounted to about $2,400. It was during this period that the accounts of complainants against Carrier were made for materials and supplies used in the construction of the road. It is claimed by Catron that ninety per cent. of the work done by Carrier was very easy dirt work, not worth over twenty cents a yard, and that when he undertook the completion of the work, it was done at a loss of $200.

The contract between Catron and Carrier was terminated by a contract between them made on August 16, 1913, in the following words and figures:

"This contract made and entered into this the 16th day of August, 1913, by and between E. C. Carrier of first part and J. H. Catron, of the second part.

"Witnesseth:

"That the said F. C. Carrier this day delivered and turned over to the said Catron the four mules that he now has on the grade work mules that he bought from Brownlow Vines and all the tools such as scrapers, dump carts, maddicks, picks, and shovels, hammers, steel blacksmith shop. Also all household and kitchen furniture that he has at Relem mines camps and all of the above property is and now belongs to the said J. R. Catron for failure of the said F. C. Carrier to comply with contract made on the 18th day of July, 1913, to grade three miles of road in Wise county. Also Catron is to take charge of said work and to make payment direct to all hands and not to pay F. C. Carrier

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for anything he has done or may do, only pay him at the rates of one hundred dollars per month as long as he works and he is to work as Catron directs and whenever at any time the work is not paying for any one month Catron has right to turn Carrier off as foreman and him have no more to do with the work or outfit before mentioned. But if Carrier carries on the work satisfactorily to Catron and after Catron gets the ten per cent. retained in the contract made on the 18th day of July, 1913, and fifteen hundred dollars more clear out of said work after paying everything and all damages that he may have to pay, then Catron is to pay over to the said F. C. Carrier all the remainder and also to let him have all the mules, tools and household and kitchen furniture herein mentioned. This contract is to be completed by the 31st day of January, 1915. The contract made on the 18th day of July, 1913, is to be delivered to Catron. Given under our hands on the first named date."

"F. C. CARRIER.

"J. H. CATRON."

It is contended on behalf of the complainants and Carrier, who was their chief witness, that the written contract does not represent the real agreement entered into between the parties; that under the real agreement Catron was not only "to make payment direct to all hands" employed on the work by Carrier, but also to pay the debts contracted by Carrier for supplies, including the debts of complainants; that the contract was prepared by Catron and was read by Catron to Carrier, who could neither read nor write, and that he did not read it as it was written, but according to the real agreement of the parties. It is further contended that there was no consideration for the contract, and that it was entered into for the purpose of defrauding complainants and others, creditors of Carrier.

Catron claims that on August 19, 1913, he entered into an oral contract with Carrier by which he sold him "every-

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thing I have here," including his estimates, for the consideration of $300. Catron stoutly denies that he was indebted to Carrier in any sum whatever at the time of the institution of these suits. Whether or not he was so indebted is the pivotal point in these cases, as it was this debt which was attached. On this point, and questions incident to it, the evidence is of the most conflicting and unsatisfactory nature, and the case is rendered so doubtful in consequence of such conflict, and the evidence is so evenly balanced, that I am unable to say on which side it preponderates. It was preeminently a case for an issue out of chancery to determine whether or not at the time of the institution of these suits Catron was indebted to Carrier, and, if so, in what amount. As said in *Shoemaker* v. *Shoemaker*, 112 Va. 798, 800, 72 S. E. 684, the case was "one peculiarly for a jury and the error of the court was in not ordering of its own motion an issue out of chancery." While directing an issue to be tried by a jury is a matter of discretion with a court of equity, it is not an arbitrary discretion, but one to be exercised upon sound principles of reason and justice. A mistake in its exercise is just ground of appeal, and the appellate court will determine whether or not it has been properly exercised in a given case. It is error to direct an issue when it should not have been exercised, and it is equally error to fail to direct one when it should have been directed. The object of the issue is to inform the conscience of the chancellor, and for this purpose he may direct it, though not requested by either party. *Morgan* v. *Booker*, 106 Va. 369, 56 S. E. 137; *Holm* v. *Lynchburg Trust & S. Bank*, 106 Va. 603, 56 S. E. 598; *Ewan* v. *Louthan*, 110 Va. 575, 66 S. E. 869; *Miller* v. *Wells*, 95 Va. 337, 28 S. E. 337; *Stevens* v. *Duckett*, 107 Va. 17, 57 S. E. 601; *Shoemaker* v. *Shoemaker*, 112 Va. 798, 72 S. E. 684.

It is suggested in the brief of appellees that the trial court was in a better position than this court to judge of the

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credibility of the witnesses, and hence great weight should be given to its decree. Had the witnesses appeared before the trial judge and testified in his presence, I should unhesitatingly have been of opinion to affirm his decree; but all the evidence in these causes was given in the form of depositions, and the trial court was in no better position to judge of the weight of the evidence than this court is. His personal opinion of the character of witnesses who testify in a cause cannot take the place of evidence properly introduced, subject to cross-examination. Of course, no intimation is intended that such a course was adopted in the instant case. Undoubtedly the decree of the trial court is entitled to great respect, and is generally presumed to be right, but where the evidence was not given before the trial court, but by depositions, and is conflicting, and involves not only the question of the credibility of the witnesses but the charge of fraud on the part of some of the parties who have testified in the cause, it is peculiarly a case for an issue to be tried by a jury, and if the chancellor has failed to order it, though not requested by the parties, his decree will be reversed. *Shoemaker* v. *Shoemaker, supra.*

A majority of the court, however, are of opinion that there is sufficient evidence in the record to sustain the decree of the trial court in each of these cases, and that no issue out of chancery was necessary. The decree is therefore affirmed.

Affirmed.

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Syllabus.

Staunton.

CHAPMAN AND OTHERS v. RICHARDSON.

September 19, 1918.

1. STREETS AND HIGHWAYS—*Appeal and Error—Review of Decision of Board of Supervisors by Circuit Court.*—The finding and order of a board of supervisors that a road and landing ought not to be established and the dismissal of the application for the establishment of the landing and road are reviewable by the circuit court, under section 944a, subsection 5, Pollard's Supplement 1910.
2. STREETS AND HIGHWAYS—*Appeal and Error—Review of Decision of Board of Supervisors by Circuit Court.*—From the early history of the Commonwealth to the present time, the different statutes on the subject have given an appeal of right to *any person* who thinks himself aggrieved by an order in a controversy concerning a county road.
3. STREETS AND HIGHWAYS—*Appeal and Error—Review of Decision of Board of Supervisors by Circuit Court—Finality of Decision.*—Whenever the board of supervisors reach the point in the investigation where they are of opinion that the road or landing ought not to be established, then it becomes their duty to proceed no further, but to enter an order to that effect and to dismiss the application. Obviously, such order is a finality in that tribunal so far as the applicant is concerned, and to say that he has no appeal from such order "at that stage of the proceedings" amounts to an absolute denial of his right of appeal. The order expressly denies the application and dismisses the proceeding, which ended the controversy, and there could be no subsequent "stage of the proceeding."
4. STATUTES—*Construction—Revision.*—The general rule of construction of statutes is firmly established by the decisions of the Supreme Court of Appeals, that where there has been a revision of the laws the presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new.

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Error to an order of the Circuit Court of New Kent county, dismissing an appeal from an order of the board of supervisors refusing the application for the establishment of a public road and landing.

Reversed.

The opinion states the case.

Isaac Diggs, for the plaintiffs inff error.

Henley, Hall, Hall & Peachy and *Herbert I. Lewis* and *Manly H. Barnes,* for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This was an application by E. C. Chapman and other citizens of New Kent county to the board of supervisors for the establishment of a public landing on York river in that county and a public road leading thereto.

The general road law applicable to the case is composed of a compilation of enactments taken from various acts of the General Assembly, and is found or referred to in 3 Va. Code Ann. (Supp. 1910), sec. 944-a, which is divided into a number of subsections.

Viewers were appointed as provided by subsection (2), who reported favorably as to the establishment of the road and landing. Their report showed that only the land of W. P. Richardson would be affected, and indicated the quantity of land necessary to be taken and what, in their opinion, would be a just compensation therefor. The board of supervisors rejected the report, and, as required by statute, made an order that the opinion of the board was against establishing the road and landing, and dismissed the application. From that order the applicants took an appeal of right to the circuit court. The board of supervisors were made parties and the land owner summoned to protect his

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interest. He, thereupon, entered a special appearance at the next term of the court and submitted a motion to dismiss the appeal on the grounds that such appeal did not lie "at that stage of the proceedings," and also because "no appeal was provided from the order with respect to the landing." The court sustained the motion on the first ground, and dismissed the appeal with costs; and from that order this appeal was granted. The sole question for our determination, therefore, is: Was the finding and order of the board of supervisors that the road and landing ought not to be established and dismissing the application reviewable by the circuit court?

The answer to that question depends upon the correct interpretation of subsection (5), the pertinent parts of which read: "Upon the return of said process duly executed, defense may be made to the said proceedings by any party, and the board of supervisors may hear testimony touching the expediency or propriety of establishing or altering the road or landing. Upon such hearing, *unless the board of supervisors be of opinion that the road or landing ought not to be established or altered, in which case it shall so order,* it shall proceed to fix upon a just compensation," etc. (Italics supplied.) "If such applicant, proprietor, or tenant, is dissatisfied with the decision of the board of supervisors in respect to the opening or location of the proposed road, or the amount of compensation allowed, he may of right appeal to the circuit court of said county, and the said court shall hear the matter *de novo*, with the further right of appeal as provided by general law. Upon the hearing of said appeal, the said court shall ascertain, and by its order determine, first, whether said road ought to be established at all; and if so, where; second, if established, the amount of compensation," etc. Acts 1910, pages 251-2.

From the early history of the Commonwealth to the present time, the different statutes on the subject have

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given an appeal of right to *any person* who thinks himself aggrieved by an order in a controversy concerning a county road. Thus, when the original jurisdiction over public highways was vested in the county and corporation courts, an appeal of right from the order of such courts lay to the circuit court, with the ultimate right of appeal under the general law governing appeals to this court.

The statutes granting such appeals are substantially the same. 1 R. C. 1819, p. 194, sec. 18; Code 1849, ch. 182, p. 682, sec. 1; Code 1887, sec. 3453. And, as we have seen, under the compilation of the road law referred to above, a similar appeal of right is *in terms* preserved to the applicant from an order of the board of supervisors denying the application, when the board is of opinion "that the road or landing ought not to be established or altered."

The general rule of construction of statutes is firmly established by the decisions of this court, that where there has been a revision of the laws the presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. Address of Judge E. C. Burks, Reports Va. State Bar Association, Vol. 4, p. 116; *Harrison* v. *Wissler,* 98 Va. 597, 36 S. E. 982; *Puckett* v. *Mullins,* 106 Va. 248, 55 S. E. 676; *Wright* v. *Collins,* 111 Va. 810, 68 S. E. 942.

As was said by Moncure, J., in speaking of the revision of 1849, in *Parramore* v. *Taylor,* 11 Gratt. (52 Va.) 220, 242, "Great alteration was made in words and phraseology, while comparatively little was made in substance." So, we find in the revision of the road laws, though the diction has been varied to meet changed conditions, nevertheless, the legislative purpose is plain to reserve "to the applicant, proprietor, or tenant, who is dissatisfied with the decision of the board of supervisors in respect to the opening or location of the proposed road, or the amount or compensation allowed," an appeal of right to the circuit court, which

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"shall hear the matter *de novo*, with the further right of appeal under the general law." It is also clear that an order of the board of supervisors, "that the road or landing ought not to be established or altered," is both within the language and contemplation of subsection (5) giving to the applicant an appeal of right to the circuit court. Such order is required by law to be made; and it is made the duty of the court upon hearing the appeal to "ascertain and by its order determine, first, whether said road ought to be established at all; and, if so, where located; second, if established, the amount of compensation to which such proprietor is entitled * * *." In the light of the context and the legislative history bearing on the subject, the provision is too plain to be misunderstood. Whenever the board of supervisors reach the point in the investigation where they are of opinion that the road or landing ought not to be established, then it becomes their duty to proceed no further, but to enter an order to that effect and to dismiss the application. Obviously, such order is a finality in that tribunal so far as the applicant is concerned, and to say that he has no appeal from such order "at that stage of the proceeding" amounts to an absolute denial of his right of appeal. The order expressly denies the application and dismisses the proceeding, which ended the controversy, and there could be no subsequent "stage of the proceeding."

For these reasons the order of the circuit court dismissing the appeal from the board of supervisors must be reversed, and the case remanded for further proceedings to be had therein in accordance with the provisions of the statute in such cases made and provided.

Reversed.

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Staunton.

CITY OF ROANOKE V. ELLIOTT AND OTHERS AND MANIHAN AND OTHERS V. ELLIOTT AND OTHERS.

September 19, 1918.

1. STATUTES—*Constitutionality—Emergency Clause.*—Section 53 of the Constitution of 1902 forbids putting statutes other than appropriation bills into immediate operation, "unless in case of emergency (which emergency shall be expressed in the body of the bill)." It is, therefore, necessary to state in the body of the bill that an emergency exists, in order that it may be put into immediate effect, for so the Constitution declares, but the grounds of the emergency need not be stated.
2. STATUTES — *Constitutionality — Emergency Clause — Review by Courts.*—The legislature is the sole judge of what shall constitute an emergency which will justify putting an act into immediate effect, and its action is not reviewable by the courts. Whether the reasons actuating the legislature to take such action were good or bad, reasonable or unreasonable, are not subjects of judicial inquiry. It is a matter resting wholly with the legislature.
3. CONSTITUTIONAL LAW—*Constitution not a Grant of Powers.*—The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.
4. STATUTES—*Presumption in Favor of Constitutionality.*—Every presumption is to be made in favor of the constitutionality of a statute, and it will never be declared to be unconstitutional unless it is plainly and clearly so. If any reasonable doubt exists as to its constitutionality, the act will be upheld. To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it, and the case must be plain indeed before a court will declare a statute null and void.
5. CONSTITUTIONAL LAW—*Construction by Legislature.*—Furthermore, in cases of doubt, the construction placed upon the Con-

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stitution by the legislature itself is entitled to consideration, but will not be permitted to overturn plain language.

6. MUNICIPAL CORPORATIONS—*Change of Form of Government—Election—Writ of Error.*—After an election was duly ordered and held under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, the city petitioned asking to be made a party defendant to the proceeding whereby the election was ordered and held, and that the petitioners upon whose petition the election was ordered and held should be made defendants to the city's petition. Subsequently, a number of electors tendered their petition also asking to be made parties defendants. This procedure adopted by the city and the petitioning electors was anomalous. It was neither an ordinary common law action nor a suit in equity. It was not anthorized by any statute, nor does it conform to the extraordinary common law remedies of *mandamus, quo warranto,* or *certiorari.* It is an attempted intervention in a proceding made *ex parte* by the statute. The action of the city in intervening in the cause was in the nature of an appearance of an *amicus curiae,* and was advisory only. It conferred no rights upon the city.

7. MUNICIPAL CORPORATIONS—*Change of Form of Government—Election—Writ of Error.*—In a proceeding under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, for an election to change the form of government of a city to that known as the "City Manager Plan," the judge of the circuit court acts in a ministerial capacity, and to his finding of facts certified to the clerk of the city council no writ of error lies.

8. MUNICIPAL CORPORATIONS—*Change of Form of Government—Election—Writ of Error.*—Under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, the judge was to ascertain and certify a fact, to-wit, Did "a majority of the electors, qualified to vote at such election," vote for or against the proposed change? This, in the instant case, the judge did, and whether his construction of the statute was right or wrong, or his duty was ministerial or judicial, no writ of error to, or appeal from, his order is given by these acts or any other statute of this State.

9. PUBLIC OFFICERS—*Ministerial or Judicial Duties.*—Whether a duty imposed is judicial or ministerial is to be determined by the nature of that duty, and not by the tribunal or person that is to discharge it. Judicial tribunals are often charged with the performance of purely ministerial functions, and it is equally true that executive or ministerial officers are sometimes charged with judicial or *quasi* judicial functions. The duty to ascertain a fact from evidence does not *per se* render the duty judicial.

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10. MUNICIPAL CORPORATIONS—*Change of Form of Government—Duties of Judge Judicial or Ministerial.*—In the cases at bar, the statute imposed upon the circuit court, or the judge thereof, two duties, which so far as their nature is concerned could just as well have been imposed on any ministerial, or executive officer. The first of these was the ordering of the election, and the second the certifying of the results thereof to the city council.

11. PUBLIC OFFICERS—*Failure to Discharge Duties—Mandamus.*—Ministerial and executive officers, in the course of their official conduct, are construing statutes every day, and yet if, in consequence of their misconstruction, they fail to discharge their duties they may be compelled to do so.

12. PUBLIC OFFICERS—*Quo Warranto—Mandamus.*—The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. While it is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus*, the practice of trying title to office by *mandamus* in Virginia is sustained by a line of decisions covering over a century of the State's judicial history, and it is now the well settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases.

Error to an order of the Circuit Court of city of Roanoke, in a proceeding on the petition of M. C. Elliott and others for an election submitting to the voters of the city of Roanoke the question of changing its form of government.

Writs of error dismissed.

The opinion states the case.

S. Hamilton Graves and *Hall, Wingfield & Apperson*, for the plaintiffs in error.

Jackson & Henson and *C. A. McHugh*, for the defendants in error.

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BURKS, J., delivered the opinion of the court.

Section 117 of the Constitution of this State, as amended, authorizes the General Assembly to provide from time to time for the various cities and towns of the Commonwealth such form or forms of municipal government as it may deem best, but that no form or forms shall become operative except as to such cities or towns as may thereafter adopt the same "by a majority vote of its qualified electors at an election to be held as may be prescribed therefor by law." This amendment became effective in 1912. In 1914 the legislature enacted a statute to put it into operation (Acts 1914, p. 165). In 1916 this statute was amended (Acts 1916, p. 672), and again in 1918 (Acts 1918, p. 402). The amendment of 1918 was put into immediate effect by an emergency clause, and the election was held May 6, 1918. This amendment is assailed as unconstitutional because the emergency clause merely states the existence of the *fact* of emergency, and does not state the *grounds* of the emergency. The constitutional provision upon which this claim is based is contained in section 53 of the Constitution, which forbids putting statutes other than appropriation bills into immediate operation, "unless in case of emergency (which emergency shall be expressed in the body of the bill)." The Acts of 1914 and 1916 each provided that a majority of the qualified voters *authorized to vote at such election* must vote for the proposed change in order to secure its adoption. The act of 1918, however, changed the language of this clause, and followed the language of the Constitution requiring the election to be carried "by a majority vote of the qualified electors."

On April 4, 1918, M. C. Elliott and others, constituting the requisite number of electors, filed a petition before the judge of the circuit court of the city, praying that an election be ordered for the purpose of submitting to the quali-

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fied voters of the city the question of changing the form of government of the city as then organized to that known as the "City Manager Plan," in accordance with the act of Assembly entitled, "An act to provide for a change in the form of government of cities having a population of less than 100,000, and of towns, and to provide in what manner such cities and towns may adopt such form of government," approved March 20, 1916, "and of acts amendatory thereof." The petition was accompanied by the certificate of the clerk of the corporation court, as required by the statute, showing that the number of voters qualified to vote at the last election held in the city for municipal officers was 4456. The election was duly ordered, and was held on May 6, 1918. The commissioners of election certified to said judge that 1470 votes were cast at the election, and that of those 368 were against the proposed change of government, and 1102 were in favor of the proposed change of government. Before any order was made by the judge, to-wit, on May 10, 1918, the city of Roanoke appeared by counsel and tendered its petition asking to be made a party defendant to the proceeding whereby the election was ordered and held, that the petitioners upon whose petition the election was ordered and held should be made defendants to the city's petition, and that the court declare that the proposed change in the form of government of the city had not been adopted by the requisite majority. The city was admitted as requested, and on May 11, 1918, the judge entered the following order:

"It appearing that the election held in the city of Roanoke on the 6th day of May, 1918, pursuant to the order and writ made and issued by the judge of this court on the 4th day of April, 1918, whereby it was submitted to the qualified electors of said city whether or not the existing form of municipal government of the said city should be changed to that known as the 'City Manager Plan,' as de-

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fined and fully set out in chapter 392 of the Acts of 1916 and acts amendatory thereof, 1102 votes were cast in favor of said change and 368 votes were cast against said change, and it appearing further therefrom that said eleven hundred and two (1102) votes so cast in favor of said change of form of government, constitute a majority of the qualified electors of the said city, according to the true intent and meaning of the Constitution of Virginia and of said act as amended by act approved March 14, 1918; and it further appearing that said election was held after the notice provided in said order and writ as required by law, and that said election was conducted both as to the notice and manner of holding the same in accordance with the provisions of the law, and it is therefore so ordered.

* * * * * * * * * *

"It is further ordered that pursuant to the will of the people of said city, as declared by a majority vote of the qualified electors voting in the manner prescribed by law, the existing form of municipal government of said city be and the same is hereby changed to that known and defined as the 'City Manager Plan,' as set out and prescribed in chapter 392 of the Acts of 1915 [1916] an acts amendatory thereof.

"It is further ordered that the clerk of this court shall forthwith certify a copy of this order to the council of the city of Roanoke for recordation upon its journal, as required by law."

To this order a writ of error was awarded to the city of Roanoke.

Subsequently, to-wit, on May 16, 1918, Morris Manihan and sixteen others, electors of said city, tendered their petition also asking to be made parties defendants to the petition of M. C. Elliott and others, upon whose petition the election had been ordered and held, and praying for the same relief as was prayed by the city of Roanoke. Elliott

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and others resisted the filing of this petition on the ground that the cause was ended and the petition could not then be filed, and, further, if intended to contest the election, it could not be entertained, as the notice required by the statute had not been given. The petitioners stated that they did not ask that their petition be treated as a petition to contest the election, and thereupon the court entered an order declining to permit the petition of Manihan and others to be filed. To this order a writ of error was awarded to Manihan and others.

A number of questions of interest and importance have been ably argued before us, but, in the view we take of the case, it will be unnecessary to pass upon them.

It has been urgently insisted, both in the oral argument and in the briefs, that the emergency clause of the act of 1918 is not sufficient compliance with the provision of section 53 of the Consitution, postponing the operation of acts, other than appropriation acts, until ninety days after the adjournment of the General Assembly, "unless in case of emergency (which emergency shall be expressed in the body of the bill)." Plaintiffs in error insist that the words "which emergency" are entirely superfluous, if it is sufficient simply to declare the fact of the existence of an emergency, and that, in order to give them any effect, it is necessary that "the facts or conditions constituting the emergency shall be expressed or declared." Such a construction would read into the Constitution words which the convention which framed it did not see fit to use. If such had been its intention, nothing would have been easier than to have said so in language that was plain and unequivocal. The word "emergency" in parentheses was apparently placed there merely to point out with definiteness and more certainly the antecedent to which the word "which" referred. The constructin would be the same if the second word "emergency" and the parentheses were omitted altogether,

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and the sentence read "unless in case of emergency which shall be expressed in the body of the bill." We do not omit the word "emergency," however, in our interpretation of the clause, but give to it its apparent and natural meaning, in the connection in which it is used, that of emphasis and certainty. It is necessary to state in the body of the bill that an emergency exists, in order that it may be put into immediate effect, for so the Constitution declares, but counsel very properly admit that "the legislature is the sole judge of what shall constitute an emergency which will justify putting an act into immediate effect," as the authorities so hold. See cases cited in 33 Cyc. 1193, 1194. It is for the legislature to "ascertain and declare the fact of the existence of the emergency, and their determination is not reviewable elsewhere. The Constitution has vested the law-making department of the government with power to determine that question * * * and such determination is not made reviewable by the courts." *Biggs* v. *McBride*, 17 Or. 647, 21 Pac. 880, 5 L. R. A. 118-19. Whether the reasons actuating the legislature to take such action were good or bad, reasonable or unreasonable, are not subjects of judicial inquiry. It is a matter resting wholly with the legislature. It was well suggested by counsel for the defendants in error that—

"All the members of the legislature might agree that an emergency existed for the passage of the act, yet they might disagree as to the cause of the emergency, or as to the facts which constitute the emergency. How then would they vote? Surely, if all the legislature agreed that an emergency existed, but they were all split up as to the facts which constituted the emergency, they should not be denied the privilege of passing the bill as an emergency bill because they disagreed as to the facts which constituted the emergency."

If the legislature is the sole judge of the existence of an

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emergency, and its action is not reviewable, why should it state the reasons actuating it, in the absence of a constitutional requirement to that effect? Why should it state reasons which no one could call in question? We confess our inability to answer the question.

The reason for postponing the operation of statutes, as is done by section 53 of the Constitution, was that the people might be informed of their contents before they became effective. The reason for making exceptions to the rule was manifest necessity. The reason for stating that a particular act belonged to the emergency class was to call that fact to the attention of members of the legislature, not of the people, so that they might carefully examine it and determine for themselves whether or not the act should be so classified. Notice to the people of an alleged fact which they could not controvert would be vain.

If it was intended to require the legislature to state the reasons for the emergency, the convention would have used language similar to that of the Kentucky Constitution, "but the reasons for the emergency that justifies this action must be set out at length in the journal of each House." (Const. §55.) Quoted in *Commissioners* v. *George* (Ky.), 47 S. W. 782, 84 Am. St. Rep. 454.

Counsel for the plaintiffs in error say in their brief that "after exhausting the authorities accessible to the writer, but one case has been found which is specific upon the question here presented," and cites *Biggs* v. *McBride, supra.* Defendants in error have not been able to add any other, nor have we found any.

The provision of the Constitution of Oregon which was under consideration in that case was as follows:

"No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law." (Article 4, § 28.)

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The emergency clause in the act considered was as follows, to-wit: "Inasmuch as the amendments herein proposed would greatly tend to benefit the people of this State, and there is urgent necessity therefor, this act shall take effect and be in force from and after its approval by the Governor." It did not in terms state that an emergency existed, nor state any fact or facts showing that the act "would greatly tend to benefit the people," and the question before the court was, whether or not what was so stated was a sufficient statement of the existence of an emergency. The court held the emergency clause sufficient, and the act constitutional.

Counsel for the plaintiffs in error make the following quotation from the opinion of the court, to show that the court held that it is necessary to state the reasons for the emergency: "It is the fact of the existence of any event or occasional combination of circumstances, which calls for immediate action or remedy, or the fact that some pressing necessity or exigency exists which enables the legislature, by declaring the same in the preamble or body of the act, to put the same in force sooner than the time prescribed in the Constitution in cases where there is no such emergency, or the same is not so declared; but, in all such cases, it is for the legislature to ascertain and declare the fact of the existence of the emergency, and their determination is not reviewable elsewhere. The Constitution has vested the law-making department of the government with the power to determine that question (*Carpenter* v. *Montgomery*, 7 Black [Ind.] 415; *Gentile* v. *State*, 29 Ind. 409); and such determination is not made reviewable in the courts. No doubt the emergency must be declared in the body or preamble of the act, but, if there is no fact, event or state or condition of affairs mentioned which the legislature determines creates an emergency, no difference how strongly or directly it may be asserted in the act that it is necessary that it should go

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into effect immediately, the legislative declaration must fail, for the reason the Constitution is not complied with."

If the contention of the plaintiffs in error be correct, that the latter part of the paragraph quoted means that the *grounds* of the emergency must be stated, then it is in conflict with the other statements of the paragraph, that "it is for the legislature to ascertain and declare the *fact of the existence of the emergency and their determination is not reviewable elsewhere.* The Constitution has vested the law-making department of the government with the power to determine that question * * * and *such determination is not made reviewable in the courts.*" (Italics supplied.) It must be borne in mind that in the act there under consideration no emergency was *expressly* stated, and the court was considering whether what was stated amounted in effect to a declaration of an emergency, and the language used must be read in this light. It seems more probable, therefore, that the court meant to hold that where no emergency was *expressly* declared, the court would consider the language used and determine for itself whether or not it was tantamount to a declaration of the existence of the fact of an emergency, and that no matter how strongly or directly it might be asserted in the act that it was necessary that it should go into effect immediately, such assertion would be ineffectual unless the act either contained an emergency clause, or what, in effect, amounted to such a clause, for otherwise it would not be in compliance with the Constitution. The words, "no difference," are used in the sense that it was a matter of indifference, or of no consequence. This construction makes the paragraph quoted harmonious and in accord with the later Oregon case hereinafter cited.

Some time after this decision was rendered, the Constitution of Oregon was amended so as to restrict the use of the emergency clause to laws "necessary for the preserva-

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tion of the public peace, health or safety." After this amendment, the emergency clause could not be annexed to a bill unless the proposed law was "necessary for the preservation of the public peace, health or safety." The Constitution designated the class of cases, and the only class, to which the emergency clause could be annexed. After the adoption of the amendment, the legislature of Oregon passed an act containing the following emergency clause: "* * * it is hereby adjudged and declared that existing conditions are such that it is necessary for the immediate preservation of the public peace, health or safety; therefore an emergency is hereby declared to exist, and this act shall take effect * * * after its approval by the Governor." It was insisted that the emergency clause was not sufficient because it did not set forth the facts creating the emergency. But it was held that the "legislature has the exclusive power to declare an emergency without setting out the facts creating the emergency." *Bennett Trust Co.* v. *Sengstacken*, 58 Ore. 333, 113 Pac. 863. The report of the case does not show that there had been any change in the language of the emergency clause, but that another section of the Constitution had been so amended as to restrict the class of cases to which the emergency clause might be annexed. In the course of the opinion of the court, in discussing the amendment and referring to the well known rule of pleading, that pleadings must state facts and not legal conclusions, it is said: "The argument of plaintiffs' counsel on this point is analogous to the rule of pleading requiring a statement of facts from which a court may be able to draw a desired conclusion of law. In such cases it is conceded to be insufficient, in point of law, merely to plead such conclusion without stating the facts authorizing it. Counsel would apply this argument to the case in hand so as to require the legislative assembly to set out in detail the ultimate facts it relied upon as au-

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thorizing the declaration of an emergency, in order that a court called upon to construe the act may consider the facts as alleged by the legislative assembly, not to call in question the truth of the legislative statement of facts, but to determine whether the emergency is a proper conclusion to be drawn from such facts. But no such strict rule hampers the legislative branch of the State government. It has the exclusive power to declare that its enactments are necessary for the immediate preservation of the public peace, health, or safety, and that hence an emergency exists on account of which the act shall take effect when the legislative process, as applied to the act in question, is fully completed." There is no intimation in the opinion that it is in any way in conflict with *Biggs* v. *McBride, supra,* and as we construe it, the case holds that the statement of the *fact* of emergency, without giving the reasons therefor, is sufficient.

In *Commissioners* v. *George* (Ky.), 47 S. W. 779, 84 Am. St. Rep. 454, the court was considering the Constitution of Kentucky which required that the *reasons* for the emergency should be set out at length in the journal of each house. Our Constitution is so entirely different that the case throws no light on the subject.

In *Nebraska* v. *Pacific Express Co.*, 80 Neb. 823, 115 N. W. 619, 18 L. R. A. (N. S.) 664, the following was held to be insufficient as an emergency clause: "Sec. 7 (Emergency). This act shall take effect on * * * after its passage and approval." We do not regard this clause as at all the equivalent of the clause under consideration. Each section of the act contained one or more catch words simply to indicate the subject dealt with in the section. These catch words were manifestly not regarded as any portion of the sections to which they were prefixed, and the court declared the section not a sufficient compliance with the constitutional requirement, without discussion.

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It is true that, in *Couk* v. *Skeen*, 109 Va. 6, 63 S. E. 11, this court, in discussing the contention that the emergency provided for in section 50 of the Constitution should be expressed in the body of the act, did say that "the kind of emergency which might make it necessary for a bill to take effect sooner than ninety days after the adjournment of the General Assembly should be expressed in the body of the bill," but the court was there considering simply whether, under section 50 of the Constitution, there should be *expressed in the act* anything on the subject of emergency, and not whether the *fact* of the *emergency* or the grounds of the emergency should be stated. No such distinction was sought to be made, or was in the mind of the court at that time, and what was not in the mind of the court was not decided. Counsel for the plaintiffs in error properly concede that the case is *not authority* on the question now before the court, but seem to think it throws some light on it. For the reason stated, we cannot concede to it even this much.

The contention that the legislature has exceeded its powers and that a statute is unconstitutional always presents a question for serious consideration. The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit. Every presumption, therefore, is to be made in favor of the constitutionality of a statute, and it will never be declared to be unconstitutional unless it is plainly and clearly so. If any reasonable doubt exists as to its constitutionality, the act will be upheld. To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it, and the case must be plain indeed before a court will declare a statute null and void. These principles have been repeatedly

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announced by this court from a very early date. *Eyre* v. *Jacob*, 14 Gratt. (55 Va.) 422, 73 Am. Dec. 367; *Commonwealth* v. *Drewry*, 15 Gratt. (56 Va.) 1; *Brown* v. *Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676; *Commonwealth* v. *Moore*, 25 Gratt. (66 Va.) 951; *Va-Tenn. C. & I. Co.* v. *McClelland*, 98 Va. 424, 36 S. E. 479; *Prison Association* v. *Ashby*, 93 Va. 667, 25 S. E. 893; *Whitlock* v. *Hawkins*, 105 Va. 242, 53 S. E. 401; *Button* v. *State Corp. Com.*, 105 Va. 634, 54 S. E. 769; *Willis* v. *Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009.

Furthermore, in cases of doubt, the construction placed upon the Constitution by the legislature itself is entitled to consideration, but will not be permitted to overturn plain language. *Day* v. *Roberts*, 101 Va. 248, 43 S. E. 362.

In the cases at bar, not only has the legislature affirmed its constitutional power by exercising it, but in a large number of cases has enacted statutes containing emergency clauses in the very language of the statute before us. In four sessions it passed upwards of seventy of such statutes. It is true that its action in this respect has not been uniform, and that, in a much larger number of cases, the *grounds of the emergency* have been stated, but the omission in such a large number of cases tends to show that it regarded the insertion of the grounds as a precautionary measure only which could do no harm, but was in fact unnecessary. If the insertion of the grounds had been deemed necessary, the legislature would not have omitted it in numerous instances at every session since the adoption of the Constitution. The court will not presume that this was an oversight. The omission to state the *grounds* of the emergency in the act of 1918 was not a plain violation of section 53 of the Constitution, and the statute must, therefore, be upheld as a valid constitutional enactment and in force from its passage.

A motion was made to dismiss these writs of error upon

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the ground that the judge of the circuit court, in this *ex parte* proceeding, was acting in a merely ministerial capacity, and that to his finding of facts, which he certified to the clerk of the city council, no writ of error lies. The procedure adopted by the plaintiffs in error was anomalous. It was neither an ordinary common law action nor a suit in equity. It was not authorized by any statute, nor does it conform to the extraordinary common law remedies of *mandamus, quo warranto* or *certiorari.* It is an attempted intervention in a proceeding made *ex parte* by the statute, and we are of opinion that the motion should be sustained.

In *Manns* v. *Givens,* 7 Leigh (34 Va.) 689, a deed was offered for record to the county court, and at the same time evidence of its due execution, but the court refused to admit it to record because the justices "deemed the evidence in support of it inadmissible and insufficient." There were two attesting witnesses to the deed, one of whom was dead and the other a non-resident of the State, and the evidence offered was the deposition of the absent witness, taken after due notice; and the witness was subjected to cross-examination. This witness testified to the due execution and attestation of the deed. This court held that the evidence was admissible and sufficient, that the county court, as to this matter, was acting as a court of registry only, that its office was ministerial solely, and that *mandamus* was the proper remedy to compel the court to admit the deed to record.

In *Delaney* v. *Goddin,* 12 Gratt. (53 Va.) 266, the county court refused to record the report of the surveyor of a lot of land sold by the sheriff for non-payment of the tax upon it. The motion to record was made by the purchaser at the sheriff's sale, and was resisted by the former owner. The statute provided that "the county court, unless it see some objection to such report, shall order the same to be recorded." It was insisted on behalf of the former owner

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that the county court was acting judicially and had the right to examine into the regularity and validity of the proceedings previous to the report, but this court held that the duty devolved upon the county court was in no wise judicial, but purely ministerial, and that this ministerial duty was restricted to the consideration of objections to the *report,* and the court had no power to make investigations back of the *report.* It was also held by this court that *mandamus* was the proper and *only remedy* for the correction of the error committed by the county court. Two of the judges (Allen and Moncure) dissented on the question of whether the duties of the county court were purely ministerial. The same question came again before this court in *Randolph Justices* v. *Stalnaker,* 13 Gratt. (54 Va.) 523, when *Delaney* v. *Goddin, supra,* was affirmed. Judge Allen, who had dissented in the previous case, delivered the opinion of the court, and, in the course of it says: "The principal questions presented by the record have been settled by the decision of this court in the case of *Delaney* v. *Goddin,* 12 Gratt. (53 Va.) 266. That case was elaborately argued and maturely considered; and all the judges were of opinion that the authority of the county court was limited to the enquiry whether the report of the surveyor is in conformity with the provisions of the section under which it is made; and if free from objection in this respect, it becomes the imperative duty of the court to order the report to be recorded. And a majority of the court held, that in passing on such question the county court is vested *with no judicial power,* but acts in a capacity purely ministerial and that an error in refusing to order the report of the surveyor to be recorded can only be corrected by *mandamus.*

"The objection growing out of the alleged complicity of the sheriff with the purchaser, or whether the taxes and damages and cost of survey, where a survey was made, were paid by a party authorized by law to redeem to the proper

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party and within the proper time, are matters not appearing on the report or the list of sales, or anything connected therewith. The proper determination of them would involve inquiries into matters of law and fact which the county court, acting ministerially and in this *ex parte* proceeding, cannot, in conformity with the decision in the case referred to, enter into."

In *Lewis* v. *Christian,* 101 Va. 135, 43 S. E. 331, the oyster inspector was required by statute to determine whether a particular oyster rock was natural oyster rock according to a designated survey and report. If so, and stakes had been placed on the natural oyster rock or bed, it was his duty to have them removed. On an application for a *mandamus* to have removed stakes placed upon certain oyster rocks alleged to be within said survey and report, it was said that it was the imperative duty of the oyster inspector to have the stakes removed if placed on natural rocks or beds, as shown by said survey and report, and he "has to determine the existence of these facts," but that his duty was none the less ministerial because he had to determine whether or not the facts existed which made it his duty to act. In other words, the duty to ascertain a fact from evidence does not *per se* render the duty judicial.

It is not easy to lay down a general rule by which it may always be determined what acts are judicial and what are ministerial, and we shall not attempt it. But it is safe to say that whether a duty imposed is judicial or ministerial is to be determined by the nature of that duty, and not by the tribunal or person that is to discharge it. That judicial tribunals are often charged with the performance of purely ministerial functions is well illustrated by the cases hereinbefore cited, and it is equally true that executive or ministerial officers are also sometimes charged with judicial or *quasi* judicial functions. See *Thurston* v. *Hudgins,* 93 Va. 780, 20 S. E. 966, and *Rowe* v. *Drisgell,* 100 Va. 137, 40 S. E. 609; note in 44 Am. St. Rep. at p. 46, and cases cited.

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In the cases at bar, the statute imposed upon the circuit court, or the judge thereof, two duties, which so far as their nature is concerned could just as well have been imposed on any ministerial, or executive officer. The first of these was the ordering of the election, and the second the certifying of the results thereof to the city council. As to the first of these duties it was too plainly ministerial to admit of argument. When the petitions were presented, together with the certificate of the clerk required by the statute, it was a matter of the simplest nature to ascertain whether the number of electors signing the petition amounted to ten *per cent.* of the number certified by the clerk. When this fact was ascertained, the statute is mandatory that the court or judge "shall pass an order" directing the election to be held. No discretion is allowed.

After the election has been held, the statute requires that, "returns of the election shall be certified by the commissioners of election, or their clerk, to the court, or the judge thereof in vacation; and if it shall appear that the proposed change has not been adopted by a majority vote of the qualified electors, an order shall be entered of record accordingly, and no other election for any change in the form of government of such city or town shall be held within two (2) years after such election; but if the said proposed change is adopted by a majority vote of the qualified electors, the court, or judge thereof, shall enter an order accordingly, a copy of which shall be forthwith certified by the clerk of such court to the council of such city or town for recordation upon its journal." Here, again, no discretion is vested in the court or judge. A fact is to be ascertained, to-wit, "if the said proposed change is adopted by a majority vote of the qualified electors." If it is, then the statute is mandatory, "the court, or judge thereof, shall enter an order accordingly." It is sought to invest the court or judge with discretion by arguing that the words "a majority vote of

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the qualified electors" had to be construed that they are of doubtful meaning, and that their construction is a judicial act. The same may be said of any statute under which an officer has to act. Ministerial and executive officers, in the course of their official conduct, are construing statutes every day, and yet if, in consequence of their misconstruction, they fail to discharge their duties they may be compelled to do so. This is fully illustrated by the cases of *Delaney* v. *Goddin, supra; Randolph* v. *Stalnaker, supra,* and *Manns* v. *Givens, supra.* Certain facts were to be ascertained by the court or judge, but as said in *Lewis* v. *Christian, supra,* "that does not make his duty any the less ministerial." No judicial investigation was required to ascertain these facts. No day in court was given to any one, no process was to be issued, no person to be notified, and no time or place fixed for the investigation. The court or judge was to ascertain these facts just as any ministerial or executive officer would ascertain facts as a basis for official action. The investigation to ascertain the facts under such circumstances, without the presence of parties, or any provision for summoning them, or for their voluntary appearance, could hardly be called a judicial investigation in any proper sense of the term. When the facts were thus ascertained, the duty devolving upon the court or judge became imperative. No discretion in the matter was wasted in them. All that remained to be done was to "enter an order accordingly," and from such order no provision is made for an appeal.

The act under which the judge of the circuit court acted in these cases constituted him a mere canvassing or returning officer, with no power, while so acting, to go behind the returns or to inquire into the legality of the votes cast. The proceeding before him was wholly *ex parte.* The returns of the election were to be certified by the commissioners of election to the judge, and if it appeared that "a majority of the qualified electors authorized to vote at such election"

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favored the change, he was required to "enter an order accordingly," and the clerk of the court was to certify a copy of the order to the clerk of the city council. When he had done this, his powers in this respect ceased. He had no power to order or declare what the form of the city government should be in the future. The duty thus imposed, as we have stated, was ministerial and not judicial. It is said that " in nearly all the States, the board of canvassing officers are held to be ministerial officers only, whose duty it is to receive the returns from the various precincts or counties, as the case may be, and declare the results, as shown by the face of the returns." 10 Am. & Eng. Encl. Law (2d ed.), p. 746, and cases cited. In the cases at bar, the judge was to receive the returns from the commissioners of election and to "declare the results, as shown by the face of the returns." This was a ministerial duty. *McKinney* v. *Peers*, 91 Va. 684, 22 S. E. 506. If, after stating the total votes cast and the number of votes for and against the change, he drew a wrong conclusion as to the certificate he should make, that did not render the duty imposed upon him any the less ministerial. He was to ascertain and certify a fact, to-wit, Did "a majority of the electors, qualified to vote at such election," vote for or against the proposed change? This the judge did, and while we are of opinion that he was then discharging a ministeral duty, still whether his construction of the statute was right or wrong, or his duty was ministerial or judicial, no writ of error to, or appeal from, his order is given by this or any other statute of this State. In several of the cases above cited, the judges misconstrued the law, but it was held that no writ of error or appeal was allowable. See especially *Manns* v. *Givens*, *supra*; *Delaney* v. *Goddin*, *supra*.

The action of the city in intervening in the cause was in the nature of an appearance of an *amicus curias*, and was advisory only. It conferred no rights upon the city.

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The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. It is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus* (26 Cyc. 255, and cases cited), but the latter remedy is too well settled in this State to now admit of question. It is said that the practice of trying title to office by *mandamus* is sustained by a line of decisions covering over a century of the State's judicial history, and that it is now the well settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases. *Sinclair* v. *Young*, 100 Va. 284, 289, 40 S. E. 907.

For the reasons hereinbefore given, the writs of error will be dismissed as having been improvidently awarded.

Dismissed.

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Staunton.

CITY OF ROANOKE V. SARTINI.

September 19, 1918.

Absent, Burks, J.

1. STREETS AND HIGHWAYS—*Liability of Municipality—Unopened Street.*—A city is not required to open or put all of its streets in a condition for public travel, and its customary liability to the public does not attach to a paper street which has neither been accepted, opened nor improved. However, a street need not have been improved in order to hold the municipality liable. It is immaterial that a street has never been graded, if the municipality has recognized it as a public street and permitted its use as such.
2. STREETS AND HIGHWAYS—*Liability of Municipality—Unopened Street—Case at Bar.*—In the case at bar, the city council had established a street grade and a plan and survey of the city engineer, showing the street was approved by the city council. However, an excavation had been made in the street and dirt removed and used in improving other streets. Subsequently, the street was graded, but this improvement stopped just short of the excavation, which made the rest of the street impassable for vehicles. For many years, however, the street had been habitually used by pedestrians and there was a well worn path showing such use.

   Held: That this was not a paper street. The city's acceptance of it as a highway for public use is clearly shown by its having graded on both sides of the excavation, by having exercised acts of ownership in the street, by the notice which must be imputed to it that the public was using it habitually as a footway, as well as by the erection of street signs indicating that it was one of the streets of the city; and all of this in addition to the formal recognition of the existence of the street by the resolutions of the city council.
3. STREETS AND HIGHWAYS—*Liability of Municipality—Segregation of Part of Street.*—A street is usually an entirety—an unobstructed way. A city cannot by mental reservation of its officials segregate a small intermediate section of a continuous

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> street and thus avoid its customary obligations as to such part so reserved. If it proposes to make such exception it must give the public notice thereof by some unequivocal act, such as the erection of an impassable barrier to travel, or by some other unmistakable evidence of such withdrawal from public use.

Error to a judgment of the Court of Law and Chancery of city of Roanoke, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

S. Hamilton Graves, for the plaintiff in error.

A. R. Hunt and *H. M. Fox,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The controlling question in this case is whether or not that block of Sixth street in the city of Roanoke, between Rutherford and Harrison avenues, has been so dedicated and accepted as to make the city of Roanoke responsible for negligence causing an injury to a pedestrian using the same with ordinary care at the time of the accident. There has been a verdict and judgment in favor of the plaintiff upon evidence clearly justifying a recovery if Sixth street has been thus accepted by the city of Roanoke.

The defense is that the portion of Sixth street in which the accident occurred is merely a street on paper which has never been opened to the public for travel. The principle of law thus contended for by the city is well established, and a city is not required to open or put all of its streets in a condition for public travel, and the customary liability does not attach as to a paper street which has been neither accepted, opened nor improved.

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Section 2735, 6 McQuillin on Municipal Corporations, thus states the law: "For injuries on streets not yet opened for public use, the municipality is not liable. All the streets of a municipality need not be opened and put in condition for travel, and it is not liable for the condition of a street which exists merely on paper. However, the street need not have been improved in order to hold the municipality liable. For instance, it is immaterial that the street has never been graded, if the municipality has recognized it as a public street and permitted its use as such." These statements are supported by the authorities referred to.

The question is presented in this record in several ways, and constitutes the only defense of the city which it is necessary for us to consider. The record shows that a land company originally platted the tract of land upon which Sixth street is located, and that its plat shows this street; that the council of the city of Roanoke, by resolution approved August 17, 1908, established the street grade there, though it authorized no work to be done thereon at that time; and by resolution approved February 16, 1911, a plan and survey of the city engineer, showing this street, was approved by the city council. In its original condition vehicles with difficulty could have used the street through the entire block, but some fifteen or twenty years ago an excavation was made therein by contractors, working under directions of the city engineer, and the dirt removed therefrom was used in improving Kimball avenue, in Roanoke. A hole twelve feet deep was dug and rocks exposed by such excavation, and two or three years ago it was again used by the city as a borrow pit for the improvement of one of its streets. Some years ago Sixth street was graded by the city for the passage of vehicles from Rutherford avenue towards Harrison avenue for more than half of the block, and has been regularly used ever since. This improvement stops just at the hole or excavation referred to, which now

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makes the rest of the street through that block impassable for vehicles. For many years, however, the street through that entire block has been habitually used by pedestrians, and there is a well worn path showing such use; and at the corner of Rutherford avenue and Sixth street the customary street signs placed by the city show the names of these streets. Some years ago the city, at the request of one of its citizens, permitted him to plant a shade tree in the street and designated its location by the side of the pit. Sixth street is open to the general public and is used on both sides of the block for the rest of its length.

These facts are sufficient to show that Sixth street has been accepted by the city of Roanoke, and, therefore, that it was its duty either to grade the street or to barricade the excavation so as to remove the danger, or otherwise to exercise proper care to prevent injuries to foot passengers properly using the highway. This was not a paper street, and the city's acceptance of it as a highway for public use is clearly shown by its having graded on both sides of the excavation, by having exercised acts of ownership in the street, by the notice which must be imputed to it that the public was using it habitually as a footway, as well as by the erection of street signs indicating that it was one of the streets of the city; and all of this in addition to the formal recognition of the existence of the street by the resolutions of the city council.

It is unnecessary to discuss the facts of the case which, in our view, clearly show the liability of the city.

A street is usually an entirety—an unobstructed way. A city cannot by mental reservation of its officials segregate a small intermediate section of a continuous street and thus avoid its customary obligations as to such part so reserved If it proposes to make such exception it must give the public

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notice thereof by some unequivocal act, such as the erection of an impassable barrier to travel, or by some other unmistakable evidence of such withdrawal from public use.

The legal question is, in substance, identical with that decided by this court in *City of Newport News* v. *Scott's Adm'x*, 103 Va. 794, 50 S. E. 266.

Affirmed.

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Staunton.

CLINCHFIELD COAL CORPORATION v. REDD.

September 19, 1918.

Absent, Burks, J.

1. MALICIOUS PROSECUTION — *Declaration — Appeal and Error.*— Where a declaration contained three counts, neither of which consisted of the single charge of false arrest and imprisonment. and the gravamen of each count rested upon a charge of malicious prosecution, and the case below was proceeded with by court and counsel as an action for malicious prosecution, the Supreme Court of Appeals will deal with the case as an action for malicious prosecution.
2. MALICIOUS PROSECUTION—*Elements to Sustain Action.*—In order to sustain an action for malicious prosecution, it must be alleged and proved that the prosecution was set on foot by the defendant, and that it has terminated in a manner not unfavorable to the plaintiff; that it was instituted or procured by the co-operation of the defendant; that it was without probable cause; and that it was malicious.
3. MALICIOUS PROSECUTION—*Termination of Prosecution in Favor of Plaintiff.*—The dismissal of a warrant without a trial at the instance of the defendant was a sufficient termination of the prosecution in favor of plaintiff to enable him to maintain an action for malicious prosecution.
4. MALICIOUS PROSECUTION—*Instigation of Prosecution by Defendant—Officers of the Law.*—There can be no malicious prosecution without the machinery of the law, and it is, therefore, of course true that the officers of the law must be the final and effective actors. The question in every case is, was the prosecution instigated or brought about by the co-operation of the defendant? Such instigation or co-operation may be chargeable to the defendant from original steps taken by him to incite the prosecution, or from subsequent adoption and ratification by him of steps which had already been taken or instigated by others.
5. MALICIOUS PROSECUTION—*Instigation of Prosecution by Defendant—Officers of the Law.*—The instant case was submitted to the jury upon two theories—first, that the injury complained

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of was done by the servant of the defendant in the course of his employment, and, second, that the defendant subsequently ratified and continued the prosecution, and there was sufficient evidence to support the verdict of the jury upon either or both of these theories.

6. APPEAL AND ERROR—*Objection not Raised Below.*—The record in the instant case did not disclose how the officer who arrested plaintiff derived his authority as an officer of the law, and plaintiff's counsel contended that there was no proof of his qualification as such, but the trial was proceeded with upon the apparent concession that he was an officer, the plaintiff in his own testimony referred to him as such, his official authority was not in any way challenged, and, under these circumstances, it was too late to raise the question for the first time on appeal.

7. MALICIOUS PROSECUTION—*Officers of the Law—Agent of Defendant.*—The fact that the party who arrested plaintiff was an officer, however, did not preclude him from acting also in the capacity of an agent of the defendant. The employment of special agents, who are clothed with police powers, is a common and well-known practice among mining, manufacturing and transportation companies.

8. INDEPENDENT CONTRACTOR—*Who is.*—An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work.

9. MALICIOUS PROSECUTION—*Detective—Independent Contractor—Master and Servant.*—The person who arrested plaintiff was not on defendant company's payroll. The company paid a detective agency for his services and the agency paid him a salary. But it appeared from the evidence that he looked to the defendant for his instructions, was subject to its orders and directions, and that his principal business was to carry out the wishes and the purposes and policy of the defendant company in connection with the preservation of order and the enforcement of law at its plant, and in the instant case he did not procure or ask for a warrant until after a conference with defendant's superintendent.

Held: That the relationship of master and servant was established between defendant company and the person causing the arrest of plaintiff, and that the independent contractor doctrine did not apply.

10. MALICIOUS PROSECUTION — *Master and Servant — Independent Contractor—Non-assignable Duties.*—Selection of the servant, payment of wages, power of dismissal, and particularly the power of control, are circumstances to be considered, and are

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usually decisive, in determining the relation of master and servant; but where the work to be done involves the exercise of personal and non-assignable legal duties, no individual or corporation can escape the doctrine of *respondeat superior* by transferring to third persons the selection and payment and the power of dismissal and control of the servant. The owner of an operation or enterprise cannot, by securing through others special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity from liability for malicious prosecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal. When he undertakes these functions, his duties are personal and non-assignable, and where he arranges for and accepts the service, he will not be permitted to say that the relationship of master and servant does not exist.

11. MALICIOUS PROSECUTION—*Burden of Proof—Arrest by Officer who is also Agent of Defendant.*—The burden of proof, where a prosecution is instigated by an officer who is also an employee of defendant, is in every case upon the plaintiff to overcome the presumption that the officer was acting solely in his official capacity; but in the instant case there was evidence to justify the jury in finding for the plaintiff on that issue. Even if it be conceded that the prosecution originated in a purely official act on the part of the special agent, the jury might well have found the verdict upon the theory of the defendant's subsequent approval and ratification.

12. MALICIOUS PROSECUTION—*Ratification of Act of Agent.*—Whether the special officer in arresting plaintiff and making an assault upon him, was acting within the scope of his employment by the defendant, there can be no doubt that he intended what he did for the benefit of the defendant; and the subsequent continuance of the prosecution by the superintendent of defendant, with knowledge of what had gone before, brings the case clearly within the principle of ratification.

13. APPPEAL AND ERROR—*Affirmance—How Evidence Considered.*—After a verdict for plaintiff, the Supreme Court of Appeals must accept as true all of the facts favorable to the plaintiff which the evidence tended to establish.

14. MALICIOUS PROSECUTION—*Advice of Counsel.*—Advice of counsel, to avail as a defense, must have been sought and obtained before the prosecution is begun, must be based upon a full statement of the facts to counsel, and must be acted upon by the defendant.

15. MALICIOUS PROSECUTION—*Advice of Counsel—Purpose—Probable*

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Cause.—The true purpose for which advice of counsel may be shown in defense of an action for malicious prosecution would seem to be to establish probable cause; and the test of probable cause is to be applied at the time the action complained of was taken.

16. MALICIOUS PROSECUTION—*Law Favors Prosecution for Crime—Probable Cause.*—The law favors prosecution for crime, but this principle and policy of the law does not go to the extent of inviting the prosecution of citizens who are keeping within their rights merely because some other citizen may have an impression that there is reason to institute a prosecution. The protection which the law extends to the prosecutor depends (1) upon the existence of "such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected," and (2) upon the prosecutor's *acting* "upon such belief and expectation."

17. MALICIOUS PROSECUTION—*Probable Cause—Mistaken Belief.*—There may be circumstances under which a mistaken belief in a legal proposition, like a mistaken belief in the existence of facts, would afford ground for a prosecutor to claim probable cause as a defense in an action for malicious persecution; but such belief must be positive and definite. A confessedly doubtful state of mind will not suffice, either as to the facts or the law.

18. MALICIOUS PROSECUTION—*Probable Cause.*—Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected.

19. MALICIOUS PROSECUTION—*Probable Cause—Case at Bar.*—In the instant case the evidence did not show that there was probable cause for the prosecution of plaintiff. The facts, which are not disputed, did not warrant it, and the general superintendent of the defendant, who, as the jury had the right to find, and did necessarily find, authorized or ratified the proceeding, did not claim to have any fixed opinion or belief as to the plaintiff's guilt.

20. MALICIOUS PROSECUTION—*Advice of Counsel.*—In order that legal advice may be used as a shield against a suit for malicious prosecution, it must be given by "a person accepted and licensed by the courts as one learned in the law and competent to be adviser to clients and to the court."

21. MALICIOUS PROSECUTION—*Advice of Counsel.*—In the instant case there was nothing at all in the record to indicate that either the special officer or the superintendent of defendant company deferred in any way to the advice and judgment of the justice who issued the warrant, and if they had done so, his advice would not have constituted a legal defense to the action.

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22. LABOR AGENTS—*License.*—In *Watts* v. *Commonwealth*, 106 Va. 851, 56 S. E. 223, Ann. Cas. 1914 B, 738, it was held that the act (Appendix Virginia Code 1904, page 2247), prohibiting labor agents from conducting their business without obtaining a license, did not prohibit any person, or the agent of any person, who needed men for his own work, from hiring them without paying a license; and it would seem that the effect of the statute in that respect has not been changed by the amendment of 1916 (Acts 1916, page 880).

23. MALICIOUS PROSECUTION—*Probable Cause—Issuance of Warrant or Finding of Indictment.*—The issuance of a warrant or the finding of an indictment does not constitute conclusive proof of probable cause. Whether the issuance of the warrant constitutes *prima facie* evidence of probable cause, is an immaterial question, since the burden is always on the plaintiff to negative the existence of such cause, and the provisions of section 3955 of the Code of 1904, giving a certain discretion to magistrates in the issuance of warrants in criminal cases, do not add anything to the general law of evidence in suits for malicious prosecution.

24. MALICIOUS PROSECUTION—*Probable Cause—Question of Law or Fact.*—What is probable cause as an abstract legal proposition is a question for the court; but where there is any conflict of evidence it is for the jury to determine whether in the particular case such probable cause existed.

25. MALICIOUS PROSECUTION—*Malice—Questions of Law and Fact.*—Malice may be, and generally is, inferred from want of probable cause, though, it is said, it is not a necessary inference. It is always a question for the jury under all the circumstances of the case.

26. INSTRUCTIONS—*Read in Light of Facts.*—Instructions must always be read in the light of the facts of the particular case.

27. MALICIOUS PROSECUTION—*Instructions—Disavowal of Act of Agent.*—In an action for malicious prosecution the jury were instructed that if they believed from the evidence that the defendant company did not at first set on foot the arrest and prosecution of the plaintiff, yet if they believed that the defendant company, through its superintendent did not disavow the act at once, when it came to its knowledge, but ratified the act and continued the prosecution without probable cause, such continued arrest and prosecution is equivalent to precedent authority.

Held: Not improper under the facts of the case as demanding an immediate disavowal before the defendant had come into the possession of all the facts.

28. MALICIOUS PROSECUTION—*Malice—Want of Probable Cause.*—In an action for malicious prosecution malice may be implied

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from the want of probable cause if the circumstances will warrant the implication, but the existence of malice may be repelled by the circumstances, though there was not good ground for the prosecution, and in such cases the action will not lie.

29. INSTRUCTIONS—*Instructions are to be Read Together—Malicious Prosecution.*—In an action for malicious prosecution, an instruction that malice may be inferred from want of probable cause, standing alone, might have constituted reversible error. But instructions are to be read as a whole, and the instruction in question itself told the jury in effect that the burden was on the plaintiff to establish by a preponderance of the evidence, not only the negative proposition that the prosecution was instituted without probable cause, but also that it was malicious; and another instruction precluded any probability of a misapprehension in this respect on the part of the jury.

30. MALICIOUS PROSECUTION—*Exemplary Damages—Case at Bar.*—In view of the evidence in the instant case an intsruction that the jury if they believe that the acts complained of were committed with actual malice and a design to injure or oppress the plaintiff, might assess punitive or exemplary damages, was not erroneous.

31. INSTRUCTIONS—*Repetition.*—Where the instructions in a case cover the law of the case adequately, there is no error in the rejection of other instructions, containing correct propositions of law applicable to the case, which were substantially embodied in the instructions given.

Error to a judgment of the Circuit Court of Russell county, in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Burns & Kidd and *Morison, Morison & Robertson,* for the plaintiff in error.

Chapman, Peery & Buchanan and *M. M. Long,* for the defendant in error.

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KELLY, J., delivered the opinion of the court.

In this action for malicious prosecution S. M. Redd, herein referred to as the plaintiff, recovered against the Clinchfield Coal Corporation, herein referred to as the defendant, a verdict for $1,800, and the trial court, in accordance therewith, rendered the judgment under review.

The evidence was in some respects conflicting, but was sufficient to warrant the jury in finding the following material facts: The plaintiff, whose home was at Gate City, Virginia, was a member of the firm of Vaughan & Redd, contractors, engaged at the time of the alleged grievance, July, 1916, in constructing a highway in West Virginia. He came to Virginia for the purpose of employing laborers for his firm. After hiring some men at Honaker, a town not far from the defendant's coal mining plant at Dante, in Russell county, Va., he was told that the mines at the latter place had been shut down on account of a wash-out on the railroad and would not start up for two or three months, that many of the employees were leaving the plant, and that he could secure plenty of men there. A young man named Thompson, one of the laborers whom he had hired at Honaker, lived at Dante, and said he could go there and engage the men. Redd feared that this might be a violation of the statute prohibiting labor agents from soliciting laborers without a license, and, therefore declined to send him on the mission alone, but he took Thompson with him to furnish the names of some country boys living near Dante, who Thompson thought would like to get employment in West Virginia, and the two went to Dante, arriving there on the afternoon of July 24. The plaintiff, finding that the mines had not been shut down altogether, and finding further that there were no idle men around the place, and being told by Thompson that the boys he had in mind had gone away, decided to leave the next morning for West Virginia,

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and instructed Thompson to meet him at the depot accordingly. While he was at the depot the next day, a man named Phillips, who seems to have been a labor agent for the defendant company, told him that he had a boy who was too light for mine work, and that it would be all right with the superintendent of the company for the plaintiff to take this boy if he would pay for his transportation and what the labor agent had spent on him. The plaintiff replied that he would take the boy if it was agreeable, and thereupon Phillips said he would go to see the superintendent and report the result of his interview. Phillips returned after the train started, but in time for him to get aboard. The plaintiff, his employee, young Thompson, the boy, whose name was King, the labor agent Phillips, and a special officer also named Thompson, all boarded the train. The boy, King, approached the plaintiff and said, "That man says it will be all right for me to go with you," and the plaintiff then paid the fare of both King and Thompson. Shortly afterwards the plaintiff saw the special officer talking to the two men whose fare he had paid, and thought they looked frightened. He approached them and asked about the trouble. The officer then charged him with being a labor agent, to which he replied, "I am no labor agent, but I have hired this man Thompson at Honaker, and understood it was all right for this other man to go with me. I do not want to take him unless it is all right for him to go with me." The officer then inquired if the plaintiff had paid the boy's transportation, and upon receiving an affirmative answer informed the plaintiff that he was under arrest, and displayed his official badge. The plaintiff then asked what the officer was going to do with him, and the latter replied that he was going to take him back to Dante and try him. The plaintiff said, "You had better be sure you know what you are doing about this thing," and thereupon the officer, who was much the larger of the two men, struck the plaintiff in the face and knocked him down.

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It may be well at this point to state that this special officer was employed directly and primarily by the Baldwin Detective Agency, of Roanoke, but appears to have been giving his entire time and attention to the service and interests of the defendant company. The company called him a special officer, and secured him from the detective agency for the purpose of keeping order in and around the camp, and he was also expected and understood to look after the labor situation, including any violation of law occasioned by labor agents.

The plaintiff asked the officer to take him down to St. Paul and give him an opportunity to prove who he was and clear the matter up, but he refused to do this and took him off the train at Hamlin, a station about four miles from Dante, procured a justice of the peace, and took the plaintiff, the two boys and the justice in an automobile back to Dante to the office of Mr. Lee Long, the general superintendent of the defendant company. There the plaintiff explained to Mr. Long that he was a member of the firm of Vaughan & Redd, and was simply endeavoring to hire men for the use of his own firm, that it was not his intention to break any law, and that he had been advised by counsel that hiring laborers for himself was not illegal. Mr. Long reprimanded him for what he was doing and expressed the opinion that he had been guilty of a "damned dirty trick." The plaintiff asked the superintendent if he could not put up a bond and go away, and the former replied that he would call up his attorneys, and that when he heard from them he would let him know. That afternoon the plaintiff secured an attorney and was allowed by the justice of the peace to give security to appear back at Dante on August 1st for trial. The justice was not requested to issue any warrant at Hamlin, nor until after he arrived at Dante, and after there had been a preliminary interview between the officer and Mr. Long at the latter's office, followed by another at

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which the justice and the plaintiff were also present. The warrant was then issued by the justice, not in the presence of Mr. Long, but, as appeared upon its face, upon complaint made by him; and, while the justice could not state that Mr. Long had specifically directed him to issue the warrant, the interview at which it was determined to have the same issued was in Mr. Long's presence, and the justice understood that it was issued at his instance. Mr. Long's recollection and testimony was to the contrary.

The plaintiff appeared on August 1st, pursuant to his recognizance, but the case was carried over to the next day at the instance of Mr. Long, because he had not yet heard from his counsel. The warrant was then dismissed by his direction.

In their excellent and elaborate brief in this case, counsel for the defendant say: "The action sounded in tort. The real gravamen of the action seems to have been based on an alleged malicious prosecution, but the doctrine of the torts known as false arrest and false imprisonment and the doctrine of the torts known as malicious prosecution are so confused and commingled in the pleading and in the evidence, if not in the instructions themselves, that we do not know whether the verdict and judgment against the defendant were based on an alleged false imprisonment, or an alleged malicious prosecution, or both." And they present a strong argument and array of authorities to show that there could be no liability upon the facts of the case for false arrest and imprisonment. Of this aspect of the case, however, it is sufficient for us to say that the declaration, to which there was no demurrer, contained three counts, neither of which consisted of the single charge of false arrest and imprisonment, that the gravamen of each count rested upon a charge of malicious prosecution, and that the case below was proceeded with by court and counsel as an action for malicious prosecution. This is conceded in the

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briefs on both sides, and we shall deal with the case accordingly.

The first and most important assignment of error is that the court erred in refusing to set aside the verdict of the jury as contrary to the law and the evidence. This assignment rests upon the following propositions, advanced by the defendant: (1) That the officer, Thompson, was acting within the scope of his public duties and authority, that he was not the agent of the defendant, and that, if he committed any wrong, either he or his principal, the Baldwin-Felts Detective Agency, and not the defendant, should suffer; (2) that the defendant cannot be held to have authorized or ratified the prosecution, because its superintendent, Long, stated that he could not say what the attitude of the defendant would be until he got the advice of counsel, and dismissed the warrant as soon as he was advised; (3) that if the superintendent authorized or ratified the prosecution, he had probable cause for doing so; and (4) that there was no proof of malice.

Before taking up *seriatim* these propositions, it will be helpful to recall the several essentials of the action for malicious prosecution, as well settled in Virginia. In order to sustain the action, it must be alleged and proved: "(1) That the prosecution was set on foot by the now defendant, and that it has terminated in a manner not unfavorable to the now plaintiff; (2) that it was instituted or procured by the co-operation of the now defendant; (3) that it was without probable cause; and (4) that it was malicious." Burks' Pl. & Pr., sec. 153, p. 233; *Klaff* v. *Va. R. & P. Co.*, 120 Va. 347-8, 91 S. E. 173.

We have already stated in effect that the allegations of the declaration were sufficient; and it is conceded that the dismissal of the warrant without a trial at the instance of the defendant was a sufficient termination of the prosecution to satisfy the first of the above-mentioned requirements

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of the action. *Graves* v. *Scott*, 104 Va. 372, 51 S. E. 821, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480.

Was the prosecution instituted or procured by the "Co-operation of the now defendant?" The answer to this question will necessarily involve and dispose of the first two propositions upon which it is urged that the verdict of the jury should have been set aside.

There can be no malicious prosecution without the machinery of the law, and it is, therefore, of course, true that the officers of the law must be the final and effective actors. (26 Cyc. 8, and notes 24, 25). The question in every case is, was the prosecution instigated or brought about by the co-operation of the defendant? Such instigation or co-operation may be chargeable to the defendant from original steps taken by him to incite the prosecution, or from subsequent adoption and ratification by him of steps which have already been taken or instigated by others. The instant case was submitted to the jury upon two theories—first, that the injury complained of was done by the servant of the defendant in the course of his employment, and, second, that the defendant subsequently ratified and continued the prosecution. We are of opinion that there was sufficient evidence to support the verdict of the jury upon either or both of these theories.

The record does not disclose how Thompson derived his authority as an officer of the law, and plaintiff's counsel now contend that there was no proof of his qualification as such, but the trial was proceded with upon the apparent concession that he was an officer, the plaintiff in his own testimony referred to him as such, his official authority was not in any way challenged, and, under these circumstances, it is now too late to raise the question. The fact that he was an officer, however, did not preclude him from acting also in the capacity of an agent of the defendant. The employment

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of special agents, who are clothed with police powers, is a common and well-known practice among mining, manufacturing and transportation companies.

In 1 Thompson on Negligence, section 598, it is said: "As already seen, where a private person or corporation, under an arrangement with the public authorities, employs a police officer or deputy sheriff for the purpose of guarding the property of such private person or corporation, or preventing disorder in the conduct of its business, or where, at the request of such a person or corporation, one of its employees is clothed with special police powers by the public authorities, to accomplish the same purpose—the private person or corporation will be deemed the principal or master of the person so employed, and will be answerable for his torts committed upon third person, exactly as though he did not sustain the additional relation of a public officer."

In a note by Mr. Freeman to the case of *Ross* v. *Hixon,* 26 Am. St. Rep. 132, it is said: "Perhaps a majority of the great transportation companies have special agents or detectives whose duties include the apprehension of all persons who have committed crimes by which the property of the corporation has been embezzled, stolen or destroyed, or its interests otherwise prejudiced; and while it may be said that the delegation of authority to do these things does not imply that an agent thus constituted shall in any event act maliciously and without probable cause, to this the unanswerable reply has been made by the courts, that one of the consequences liable to attend the delegation of the authority is that of the malicious prosecution of persons who are not offenders, and that when this consequence does result, the corporation must be held answerable."

The duties of the special officer, as described by the superintendent, were "to keep order in the camp and look after such work generally for the corporation; * * * to keep us advised as to when men leave, or when there is any dis-

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satisfaction, or anything of that sort." The officer himself testified that there had been some prior trouble at Dante with labor agents securing men around the mines; that he had previously arrested a man on the same charge for which the plaintiff was arrested; that Mr. Long, the superintendent, prosecuted this man, and that trouble of this kind was one of the things he was expected to look after.

The contention of the defendant that Thompson was the employee of an independent contractor (the detective agency), and that, therefore, no liability attaches to it, does not appeal to us as possessing any merit. Immunity from liability for the act of an independent contractor results from the absence of the relationship of master and servant. The general rule on this subject is as follows: " 'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work.' * * In every case the decisive question in determining whether the doctrine of *respondeat superior* applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong?" 2 Cooley on Torts, (3d ed.), p. 1098.

Thompson was not on the defendant's payroll; it paid the detective agency for his services, and the agency paid him a salary. But it is apparent from the evidence as a whole that Thompson looked to the defendant for his instructions, was subject to its orders and directions, and that his principal business was to carry out the wishes and the purposes and policy of the defendant company in connection with the preservation of order and the enforcement of law at the plant. He testified that he had been there for eighteen months, that he had always followed the instructions given him by the general superintendent, and that he was sent there by the detective agency "to work under the manage-

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ment and superintendency of Mr. Long" and the superintendent stated that if his services had not been satisfactory he could and would have had him removed. In this connection it is a significant fact that the officer did not procure or ask for a warrant until after he had taken the justice of the peace and the plaintiff back to Dante and had a conference with the superintendent. Under the general rule, therefore, as stated in the above quotation from Cooley on Torts, the relationship of master and servant was established, and the independent contractor doctrine does not apply.

But there is a further and even more conclusive reason why the doctrine of *respondeat superior* must be applied in this case. Selection of the servant, payment of wages, power of dismissal, and particularly the power of control, are circumstances to be considered, and are usually decisive, in determining the relation of master and servant; but where the work to be done involves the exercise of personal and non-assignable legal duties, no individual or corporation can escape the doctrine of *respondeat superior* by transferring to third person the selection and payment and the power of dismissal and control of the servant. The owner of an operation or enterprise cannot, by securing through others special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity from liability for malicious prosecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal. When he undertakes these functions, his duties are personal and non-assignable, and where he arranges for and accepts the service, he will not be permitted to say that the relationship of master and servant does not exist. See *Atlantic Coast Line R. Co.* v. *Tredway's Adm'x*, 120 Va. 735, 93 S. E. 560, 562-3. The solution of the inquiry in every case harks back

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to the original question, was the prosecution procured or instituted by his co-operation?

Undoubtedly the burden was, as it is in every such case, upon the plaintiff to overcome the presumption that the officer was acting solely in his official capacity (White's Supp. 1907 to Thomp. Neg., sec. 568; *McKain* v. *B. & O. R. Co.*, 65 W. Va. 233, 64 S. E. 18, 23 L. R. A. [N. S.] 289, 131 Am. St. Rep. 964, 17 Ann. Cas. 634); but there was, in the facts already recited, abundant evidence to justify the jury in finding for the plaintiff on that issue. Even if it be conceded that the prosecution originated in a purely official act on the part of the special agent, the jury might well have found the verdict upon the theory of the defendant's subsequent approval and ratification (*Forbes* v. *Hagman*, 75 Va. 168, 177-8). There can be no reasonable question under the evidence that the warrant was issued after the general superintendent had been consulted and apprised of all the facts, and that thereafter the course and conduct of the case was entirely under his direction and control.

The justice testified in part as follows:

"Q. What was said about a warrant by Mr. Long, did he say that a warrant had to be issued for him there in the office?

"A. I would not be positive Mr. Long said that. Some one said that in the office there.

"Q. Mr. Long was present, and either Mr. Long or some one else said a warrant ought to be issued for him?

"A. I would not state it in them words exactly.

"Q. That is what you understood to be the meaning of the language used in the presence of Mr. Long in his office?

"A. Yes.

"Q. You did not issue the warrant then?

"A. No, sir, I went over to the hotel. * * *

"Q. You issued it in the hotel. You are not certain but

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what that was in the afternoon. It was along after you had dinner, wasn't it?

"A. I am not certain. I believe it was before dinner. * *

"Q. It was after the conversation with Mr. Long?

"A. Yes."

Again, with reference to the continuance of the case from the 1st to the 2nd of August, he testified:

"Q. What is your recollection of the reason the case was continued that day until the next day, Mr. Dickenson?

"A. Well, I think Mr. Long was waiting for his attorney to come.

"Q. Mr. Lee Long, the superintendent of the company?

"A. Yes.

"Q. He was prosecuting it and had it continued until the next day?

"A. Yes.

"Q. Until his attorneys could get there?

"A. Yes.

"Q. What was done with the warrant the next day?

"A. Dismissed at the Commonwealth's cost.

"Q. Who directed it to be dismissed—how happened you to dismiss it?

"A. Mr. Long. * * *

"Q. He had been prosecuting it all along and you disposed of it at his instance?

"A. Yes."

It is contended by counsel for defendants that there was clearly no ratification of the arrest and prosecution because Mr. Long, thinking the warrant had already been issued when the matter was brought to his attention, stated that he did not know what the attitude of his company would be until he got legal advice, and that until then the matter must rest in the hands of the justice of the peace. There might be considerable force in this contention if we could confine ourselves to the testimony of Mr. Long; but we have

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already seen that there was other testimony upon which the jury might have believed that Mr. Long himself authorized the issuance of the warrant after he had been fully informed of the assault and arrest previously made by the special officer. In this latter view of the affair, which we are obliged to accept under the familiar rule applicable in this court, the defendant, if not already responsible, upon the principle of master and servant, for the previous action of the officer, virtually ratified and adopted that action by continuing the prosecution. Whatever may be thought of the question whether the special officer, in following the plaintiff on the train, making the assault and the arrest, and bringing him back to Dante, was acting within the scope of his employment by the defendant, there can be no doubt that he intended what he did *for the benefit* of the defendant; and the subsequent continuance of the prosecution by the superintendent, with knowledge of what had gone before, brings the case clearly within the principle of ratification as applied by Judge E. C. Burks in *Forbes* v. *Hagman, supra.*

Nor is the case altered by the established and conceded fact that Mr. Long said he wanted to await the advice of his counsel. Bearing in mind the rule which compels us now to accept as true all of the facts favorable to the plaintiff which the evidence tended to establish, Mr. Long must be regarded as responsible for the prosecution, and he was reversing the legal order of things in seeking advice from his counsel after he had instigated or ratified the proceeding. It would seem clear that if he had sought this advice in the first instance, the warrant would not have been issued at all; but whether this be so or not, advice of counsel, to avail as a defense, must have been sought and obtained before the prosecution is begun, must be based upon a full statement of the facts to counsel, and must be acted upon by the defendant. *Forbes* v. *Hagman, supra,* 1 Cooley

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on Torts (3 ed.), 328. The true purpose for which advice of counsel may be shown in defense of an action for malicious prosecution would seem to be to establish probble cause (Burks' Pl. & Pr., p. 237); and the test of probable cause is to be applied at the time the action complained of was taken. *Forbes* v. *Hagman, supra,* Cooley on Torts, *supra,* p. 326.

Equally without merit, as it seems to us, is the argument that Mr. Long was entitled to a reasonable time for an investigation of the facts, and that he could not be held to have authorized or ratified the proceeding until he had made such investigation. We fully recognize and would not detract in the least from the influence of the salutary principle that the law favors prosecution for crime. As was well said by Judge Marshall, of Kentucky, in *Faris* v. *Starke,* 3 B. Mon. (Ky.) 4: "If every man who suffers by the perpetration of a crime were bound, under penalty of heavy damages, to ascertain before he commences a prosecution, that he has such evidence as will ensure a conviction, few prosecutions would be put on foot; the guilty would escape while conclusive evidence was sought for; offenses of every grade would, for the most part, go unpunished, and the penal law would scarcely be more than a dead letter." This language is quoted and relied upon by counsel for defendant, and we endorse it. But this principle and policy of the law does not go to the extent of inviting the prosecution of citizens who are keeping within their rights merely because some other citizen may have an impression that there is reason to institute a prosecution. And so, Judge Marshall does not stop with the language above quoted, but adds that the protection which the law extends to the prosecutor depends (1) upon the existence of "such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected," and (2) upon the prosecutor's *acting* "upon such belief and expectation."

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In the instant case, there were no disputed facts for the defendant's superintendent to investigate, nor does it appear that any investigation of facts was attempted by him, except the first interview with the plaintiff, who made a full statement as to his identity and his purpose in seeking to hire men. This statement was true, was not disputed at the time, and is not in any way questioned or discredited by anything in the record. Under the facts stated by him, the plaintiff was not violating the law, and Mr. Long did not have any definite opinion or belief as to whether he was guilty or not. As to the law of the case, he appears to have been in some doubt, but he certainly had no settled belief that the plaintiff was violating the statute. In the course of his direct examination he was asked the following question and gave the following answer:

"Q. It was your idea that this statute protected you and you tried to get legal advice, and as soon as you heard that there was some question about it, you promptly asked that the case be dismissed. Is that a fact?

"A. That is a fact, and to start with I had the feeling that if the statute gave Mr. Redd the right—I did not think anything about the statute at that time—but I had a feeling without reference to the statute that if Mr. Redd had a right to come there and take our men away and thereby injure us, that there was something wrong with the statute, something wrong with the law."

On cross-examination he testified in part as follows:

"Q. You have never understood, Mr. Long, have you, that a man was guilty of a violation of the law for the employment of men to work for himself under that statute?

"A. I have been somewhat confused on that, Mr. Peery. When a man comes to get men or employ men for a firm of contractors, or a corporation, I believe that he is not getting them for himself. I think there is some question there."

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The most that can be said, therefore, as to his state of mind with reference to the legal effect of the known and undisputed facts, is that he was in doubt upon that question. There may be circumstances under which a mistaken belief in a legal proposition, like a mistaken belief in the existence of facts, would afford ground for a prosecutor to claim probable cause as a defense in an action like this (20 A. & E. Enc. [2nd ed.], p. 808); but such belief must be positive and definite. A confessedly doubtful state of mind will not suffice, either as to the facts or the law.

Coming now to the specific question of probable cause, involved in the third proposition upon which the defendant insists that the verdict should have been set aside, the most recent definition approved by this court is as follows: "Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected." *Va. Ry. & P. Co.* v. *Klaff, ante,* p. 260, 96 S. E. 244.

The foregoing discussion of the facts and circumstances of this case has necessarily taken such a range as to show that there was no probable cause for the prosecution. The facts, which are not disputed, did not warrant it, and the general superintendent of the defendant, who, as the jury had the right to find, and did necessarily find, authorized or ratified the proceeding, did not claim to have had any fixed opinion or belief as to the plaintiff's guilt.

The principle contention of counsel for defendant in this connection is that the statute, as amended in 1916, under which the prosecution was instituted was of doubtful construction, and that the special officer and the superintendent as well as the justice of the peace might well have construed its terms as applicable to the plaintiff. The original statute was as follows: "Any person who hires or contracts with laborers, male or female, to be employed by per-

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sons other than himself, shall be deemed to be a labor agent; and no person shall engage in such business without having first obtained a license therefor. Every person who shall without a license conduct business as a labor agent, shall pay a fine of not less than one hundred dollars, nor more than five hundred dollars." (Appendix Va. Code, 1904, p. 2247.) In 1916 this act was amended so as to read (material words in the amendment indicated by italics): "Any person who solicits, hires, or contracts with laborers, male or female, to be employed by persons other than himself, *and every agent of such person,* except as provided in the next following section, shall be deemed to be a labor agent; and no person shall engage in such business without having first obtained license therefor. Every person who shall without a license conduct business as a labor agent, shall pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500). * * * An emergency existing by reason of the fact that industries are being crippled by the employment of laborers by irresponsible and itinerant labor agents to be transported to other States, this act shall be in force from its passage." (Acts 1916, p. 880, Code, Supp. 1916, p. 635.)

Counsel do not contend that the amendment can properly be construed so as to bring the plaintiff in this case within the inhibition of the statute, but they do contend that there was room for a layman or a justice of the peace to have so construed it. They suggest, as plausible, that "in the light of the decision in *Watts* v. *Commonwealth,* the amendment appears to mean, 'every agent of any person who * * * hires * * * laborers,' and not 'every agent of any person who * * * hires laborers * * * for others than himself.'"

We are unable to see any force in this argument. It presupposes a familiarity with the statutes and with the decision in *Watts* v. *Commonwealth,* 106 Va. 851, 56 S. E. 223,

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Ann. Cas. 1914 B, 738. It will not be claimed that any intelligent layman or magistrate could read Judge Whittle's opinion in that case and fail to understand that the statute, as it then read, did not prohibit any person, or the agent of any person, who needed men for his own work, from hiring them without paying a license; and we think a bare comparison of the language of the original statute and the amendment is sufficient to show that the effect of the statute has not been at all changed in so far as the controversy here is concerned. The statute was aimed at "irresponsible and itinerant labor agents," and it seems to us that the words "and every agent of such person," in the amendment, plainly and unmistakably refer to the "person who hires" as a labor agent, and not to the "persons other than himself" for whom the laborers are hired.

If, however, it be conceded that the superintendent and the justice might have reasonably and in good faith construed the statute as being applicable to the plaintiff, the final and conclusive answer is that there is no proof that they did so construe it. The superintendent does not claim to have done so, and the justice appears to have been governed entirely by what he understood to be the attitude and wishes of the superintendent. There is nothing at all in the record to indicate that either the special officer or the superintendent deferred in any way to the advice and judgment of the justice; and if they had done so, his advice would not have constituted a defense to this action. In order that legal advice may be used as a shield against a suit for malicious prosecution, it must be given by "a person accepted and licensed by the courts as one learned in the law and competent to be adviser to clients and to the court. 1 Cooley on Torts (3d ed.), p. 327; *Forbes* v. *Hagman, supra;* 18 R. C. L. sec. 31; 19 A. & E. Ency. L. p. 690.

It is further insisted by defendant's counsel that the

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fact that the magistrate issued the warrant was in itself "*prima facie* evidence, if not conclusive proof, of probable cause." That it is not conclusive proof follows from the very existence of the law permitting actions for malicious prosecution. There can be no such action until there has first been some sort of process against the plaintiff, and if the issuance of a warrant or the finding of an indictment constituted conclusive proof of probable cause, there could never be a recovery in a suit for malicious prosecution based upon a criminal prosecution. Whether the issuance of the warrant constitutes *prima facie* evidence of probable cause, is an immaterial question, since the burden is always on the plaintiff to negative the existence of such cause, and the jury was so instructed in this case. The provisions of section 3955 of the Code, cited and relied on by defendant, giving a certain discretion to magistrates in the issuance of warrants in criminal cases, do not add anything to the general law of evidence in suits of this character.

What is probable cause as an abstract legal proposition is a question for the court; but where there is any conflict of evidence it is for the jury to determine whether in the particular case such probable cause existed. In the instant case the court gave to the jury a proper definition of probable cause and submitted to them the question of its existence under the evidence.

The remaining proposition upon which it is claimed that the verdict of the jury should have been set aside is that there was no proof of malice. This question was submitted to the jury upon proper instructions, and was clearly within their province. We have already seen that there was evidence sufficient to sustain the verdict in so far as the question of probable cause was involved. "Malice may be, and generally is, inferred from want of probable cause, though, it is said, it is not a necessary inference. It is always a question for the jury under all the circumstances of the

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case." *Forbes* v. *Hagman, supra.* The circumstances must warrant the inference (*So. Ry. Co.* v. *Mosby,* 112 Va. 169, 179, 70 S. E. 517); but we cannot say that the circumstances in this case, as already detailed, were not sufficient for that purpose. We might not have viewed the evidence in this particular as they did. The labor situation at the coal mines, as elsewhere, is a difficult and delicate one to handle. Mr. Long frankly stated that he was sensitive about it, and needed and wanted to keep his men. This was a natural feeling and a proper attitude. But the plaintiff had not in fact employed or solicited a single one of Mr. Long's laborers, and whether what he said and did in connection with the arrest and prosecution of the plaintiff amounted to what the law recognizes as malice was, under the evidence as certified to us, a question for the jury.

We are of opinion that there was no error in the action of the trial court in refusing to set aside the verdict as being contrary to the law and the evidence.

The remaining assignments of error relate to the action of the trial court in giving and refusing instructions. We shall dispose of them in the order in which they are presented in the petition for writ of error.

Instruction No. 3, given for the plaintiff, was as follows: "You are further instructed that though you may believe from the evidence that the defendant company did not at first set on foot the arrest and prosecution of the plaintiff and that the person who set same on foot transcended his authority, yet if you further believe that the said defendant company, through its superintendent and agent did not disavow the act at once, when it came to its knowledge, but ratified the act and continued the arrest and prosecution, without probable cause, then such continued arrest and prosecution is equivalent to precedent authority and is chargeable to the said defendant." The chief objection urged against this instruction is, that it imposed upon the

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defendant the duty of an immediate disavowal of the action of the special officer and of the justice of the peace before the defendant had come into the possession of all the facts and without time to make inquiry in regard thereto. Instructions, however, must always be read in the light of the facts of the particular case. Simultaneously with his information as to the arrest, the superintendent was given all information which he has ever possessed in regard to the facts of the case. There is no sort of dispute as to these facts and they did not constitute any criminal offense. The words "disavow the act at once" must be taken with the explanatory or qualifying language which follows. If the jury believed from the evidence that the superintendent "did not disavow the act at once, when it came to his knowledge, but ratified the act and continued the arrest and prosecution without probable cause," they had to believe that he affirmatively ratified what had already been done, and, without probable cause, took over and proceeded with the prosecution. There was evidence upon which they might have believed that this very state of facts existed; and, if it did exist, his position was not different in law from what it would have been if he had directed from the beginning every step that was taken.

Instruction No. 1 given for the plaintiff was as follows: "The court instructs the jury that in order for the plaintiff to recover for malicious prosecution in this case, you must believe, from a preponderance of the evidence, that the defendant set on foot or instigated the prosecution of the plaintiff; that the said prosecution has ended favorably to the plaintiff; that it was without probable cause; and that it was malicious. Malice as used in this instruction means any unlawful act which is done wilfully and purposely to the injury of another, and may be inferred from the want of probable cause." The only debatable question as to the correctness of this instruction is whether the court should

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have told the jury without qualification that "malice may be inferred from the want of probable cause."

The rule upon this subject is correctly stated in the first head-note to *Southern Ry. Co.* v. *Mosby*, 112 Va. 169, 70 S. E. 517, as follows: "In an action for malicious prosecution malice may be implied from the want of probable cause if the circumstances will warrant the implication, but the existence of malice may be repelled by the circumstances, though there was not good ground for the prosecution, and in such cases the action will not lie." The instruction ought perhaps to have been qualified accordingly, and the language objected to, standing alone, might have constituted reversible error. But the instructions are to be read as a whole, and when so read there is no reasonable probability that the jury could have been misled by the one in question. That instruction itself told the jury in effect that the burden was on the plaintiff to establish by a preponderance of the evidence, not only the negative proposition that the prosecution was instituted without probable cause, but also that it was malicious; and Instruction No. 4, given for the defendant, precluded any probability of a misapprehension in this respect on the part of the jury. The latter instruction was as follows: "The court tells the jury that in order for the *defendant*, S. M. Redd, to prove a case of malicious prosecution on the part of the defendant, Clinchfield Coal Corporation, he must prove by a preponderance of the evidence a concurrence of want of probable cause and malice, and the court tells the jury that neither of these two elements alone, however clearly established, will sustain the action in the absence of the other."

Instruction No. 4, given for the plaintiff, is complained of because it told the jury that if they believed that "the acts complained of were committed with actual malice and a design to injure or oppress the plaintiff, and that the said acts were either previously authorized or subsequently rati-

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fied by the defendant, the plaintiff may also recover punitive or exemplary damages, that is to say, the jury will not be limited to mere compensation for the actual damages sustained by him; they may give him such further damages as they may think right in view of all the circumstances proved at the trial as punishment to the defendant, and as a salutary example to others to deter them from offending in like manner." In view of the evidence, as hereinbefore set out, we do not deem it necessary to say more than that in our opinion it was sufficient to warrant the instruction as given. The law upon the subject is well settled. See *N. & W. R. Co.* v. *Neely*, 91 Va. 539, 22 S. E. 367; *Southern Ry. Co.* v. *Grubbs*, 115 Va. 876, 80 S. E. 749.

This disposes of all the assignments of error except the last three, which call in question the action of the court in refusing three of the instructions requested by the defendant.

The court gave five instructions as asked for by the plaintiff, nine as asked for by the defendant, and modified and gave a tenth one for the defendant. These instructions covered the law of the case adequately, and we find no error in the rejection of the three in question. In so far as they asserted correct propositions of law applicable to the case, they were substantially embodied in other instructions. In some respects they were objectionable for reasons which have already been sufficiently discussed in this opinion.

Upon the whole case, we are of opinion that the judgment must be affirmed.

Affirmed.

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Staunton.

CUMBEE AND OTHERS v. RITTER.

September 19, 1918.

Absent, Burks, J.

1. INJUNCTION—*Demurrer—Trespass on Land—Cutting Timber.*—A bill to enjoin defendants from cutting and removing timber, which shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably necessary for farm uses, and alleges the insolvency of the defendants, is not demurrable.
2. EQUITY—*Jurisdiction—Title and Boundaries of Land—Trespass.*—The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. But where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever, indeed the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury.
3. ADVERSE POSSESSION—*Hostile and Exclusive Possession.*—The occupancy which is necessary to support a claim of title by adverse possession must be both hostile and exclusive.
4. EQUITY—*Jurisdiction—Title and Boundaries of Land.*—In a suit to enjoin a trespass on land in cutting and removing timber, where both parties claim title and possession and both are exercising acts of ownership, and one fails to establish even a *prima facie* case, in the interest of peace, law and order an equity court should take jurisdiction; and in the instant case the trial court properly determined the question raised against the defendant's contention, which rests upon a claim of title, which is entirely unsustained, if not negatived, by the evidence introduced to support it.
5. APPEAL AND ERROR—*Judgment on Appeal—Judgment Without Prejudice—Res Judicata.*—In the instant case, in view of the fact

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that the record suggested the possibility that the defendants were overconfident in their view that a court of equity had no jurisdiction, and, therefore, failed fully to present the evidence upon which they relied in support of their claim of title, the decree of the lower court was affirmed by the Supreme Court of Appeals, without prejudice to the right of the defendants hereafter to assert their title to the property in an action of ejectment, if they should be so advised.

Appeal from a decree of the Circuit Court of Giles county. Decree for complainant. Defendants appeal.

Amended and affirmed.

The opinion states the case.

W. B. Snidow, for the appellants.

Williams & Farrier, for the appellee.

PRENTIS, J., delivered the opinion of the court.

P. H. Ritter filed his bill against Henrietta Cumbee, Luther Cumbee and Gilbert Cumbee, alleging that he was the owner in fee simple of a tract of land containing 318 acres, more or less, the title to which he acquired by deed which he filed as an exhibit with the bill; that he and his predecessors in title had been in the possession thereof for more than twenty years, except a small parcel of about one acre, which had been enclosed and occupied by Henrietta Cumbee for many years, the title to which parcel had been awarded to her in an action of ejectment which he (Ritter) had brought against her; that the defendant, Henrietta Cumbee, and her sons, the other two defendants, acting as her agents, had trespassed upon his land and cut down valuable timber trees which they were preparing to haul off the

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land and appropriate to their own use; that said defendants were insolvent; that they had no claim of title to the land upon which they were thus trespassing; that the timber was of special value to him because there was only a small quantity of merchantable timber on the farm, certainly not more than enough for farm uses, so that if defendants were permitted to continue cutting it, he would suffer irreparable injury; and there was a prayer for an injunction and general relief.

The defendant, Henrietta Cumbee, filed her separate demurrer and answer to the bill. The answer denied every allegation in the bill, except the cutting down of the trees, which she says were few in number, were intended to be cut into lumber for the purpose of repairing buildings now on the land or to build new ones thereon, and that the cutting of these few trees resulted in no appreciable injury to the property and are not worth more than $10.00. She further alleged that she is the owner of eighty acres of land upon which such timber grew, describing said land by metes and bounds, and that she has been in the actual, open, notorious, visible, exclusive, hostile and undisputed possession thereof for a period of thirty years, during which time she has claimed the land, honestly believing it to be hers, and that though she has been much harassed by suits and actions in regard to it, she has successfully repulsed every effort to wrest the possession thereof from her. She also alleges and proves that Neel, from whom the complainant bought his land, instituted an action of ejectment in the Circuit Court of Giles county against the defendants for this eighty acres of land, and that after some of the evidence had been introduced for the plaintiff and before any evidence had been introduced by the defendants, the plaintiff asked permission to suffer a nonsuit, to which the defendant made no objection, and that action was thus ended; that after the complainant acquired title he brought another action of eject-

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ment for the small part of the tract containing about one acre, which the defendants had enclosed and lived upon for many years, and in that action there was a verdict in favor of the defendant, Henrietta Cumbee, and her title to this part of the land is thereby assured; and she avers that the same defense which availed her in the said action of ejectment is available as a defense if the complainant should bring an action of ejectment for the remainder of the eighty acre tract.

Neither party referred to or relied upon the amendment to section 3058 of the Code, Acts 1912, page 77.

The demurrer to the bill was properly overruled. Inasmuch as the bill shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably necessary for farm uses, and alleges the insolvency of the defendants, it is not demurrable. The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. Ann. Cas. 1915 A, note, p. 354. In this State, in the following cases it was determined that the chancery court had no jurisdiction to settle the controversy: *Stuart's Heirs* v. *Coalter*, 4 Rand (25 Va.) 74, 15 Am. Dec. 731; *Lange* v. *Jones*, 5 Leigh (32 Va.) 192; *Carrington* v. *Otis*, 4 Gratt. (45 Va.) 235; *Steed* v. *Baker*, 13 Gratt. (54 Va.) 380; *Manchester Cotton Mills* v. *Manchester*, 25 Gratt. (66 Va.) 825; *Collins* v. *Sutton*, 94 Va. 128, 26 S. E. 415; *Sulphur Mines Co.* v. *Boswell*, 94 Va. 480, 485, 27 S. E. 24; *Callaway* v. *Webster*, 98 Va. 790, 37 S. E. 276; *Deane* v. *Turner*, 113 Va. 237, 74 S. E. 165; *Litz* v. *Rowe*, 117 Va. 752, 86 S. E. 155, L. R. A. 1916 B, 799.

On the other hand, this court has in several recent cases decided that such peculiar equity existed as gave the chancery court jurisdiction, and the entire controversy has been settled in such suits.

In *Miller* v. *Wills*, 95 Va. 337, 28 S. E. 337, Riely, J., says:

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"It is very true that a court of equity will not, as a general rule, interpose in the case of a mere naked trespass. There must be something more to call forth its interference. But where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever indeed the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury. 3 Pomeroy's Eq. J., sec. 1357; 1 High on Injunctions (3d ed.), secs. 697, 702; 3 Story's Eq. J., sec. 928; *Livingston* v. *Livingston*, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353; *Switzer* v. *McCulloch*, 75 Va. 777; *Rakes* v. *Rustin L., M. & M. Co.*, 22 S. E. 498, 2 Va. Dec. 156."

"It has accordingly been held, upon the ground of the inadequacy of the remedy at law, that an injunction will lie in the case of a trespass, where the trespasser is pecuniarily irresponsible. 1 High on Injunctions, sec. 356; *Musselman* v. *Marquis*, 1 Bush. (Ky.) 463, 89 Am. Dec. 637; *Spear* v. *Cutter*, 5 Barb. (N. Y.) 486; *Malry* v. *Norton*, 100 N. Y. 424, 3 N. E. 581, 53 Am. Rep. 206; *Webb* v. *Harper*, 38 Ga. 641; *Hicks* v. *Compton*, 18 Cal. 206, and *Morgan* v. *Palmer*, 48 N. H. 338. While mere insolvency would not generally be decisive of the right to grant an injunction, it constitutes in particular cases an important element in determining whether the court in the exercise of a sound discretion should award it, for, the trespasser being insolvent, the legal remedy, 'though theoretically perfect, would be practically fruitless.' "

In *Miller* v. *Wills*, *supra*, the alleged trespassers were nonresidents of Virginia.

This doctrine has been approved and enforced in *Morison* v. *American Association, Inc.*, 110 Va. 93, 65 S. E. 469; *Moorman* v. *Lynchburg*, 113 Va. 90, 73 S. E. 987; *Woolfolk*

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v. *Graves*, 113 Va. 182, 69 S. E. 1039, 73 S. E. 721; *Ely* v. *Johnson*, 114 Va. 31, 73 S. E. 748. The contrariety of the decisions arising because of the difficulties of applying the rule to the facts of particular cases are indicated in the elaborate note to *DePauw* v. *Oxley*, 122 Wis. 656, 100 N. W. 1028, found in 13 L. R. A. (N. S.) 173; and in the note to *Jerome* v. *Ross*, 7 Johns, Ch. (N. Y.) 315, 11 Am. Dec. 498. In the cases of *Moorman* v. *Lynchburg*, *supra*, and *Woolfolk* v. *Graves*, *supra*, this court granted complete relief, and adjudged that the defendants were not entitled to jury trials because their own evidence failed to show that they had *prima facie* titles to the land in controversy, and that their assertion of title thereto was not *bona fide*.

The evidence in this case shows that the controversy has been one of long standing, and that each of the parties has been exercising certain acts of ownership under claim of title and possession of the land in controversy, inconsistent with, and in hostility to, the claims asserted by the other. Within the year previous to the institution of this suit the complainant had sworn out a crminal warrant against Henrietta Cumbee, charging her with trespass on the land, which had been dismissed. The defendants in their answer only claimed the title by adverse possession. It is true that there is an allusion to a claim by defendants under deed in the complainant's evidence, but the defendants did not claim under it, produce it, or indicate its contents. It appears that Henrietta Cumbee has lived for many years in a house which is upon the one acre of the land, which is enclosed, and which she has recovered in ejectment; and that she has claimed and pastured her cattle and hogs upon the land here in controversy for several years and exercised other acts of ownership thereon. She relies upon the doctrine that a court of equity has no jurisdiction to enjoin a mere trespass or to settle a mere question of title to land.

On the other hand, the evidence of the complainant shows

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that he and his predecessors have pastured a very much larger number of cattle on the land in controversy, has by a tenant cultivated part thereof, and tends to show that his predecessors in title collected rents from the defendants for pasturing their stock thereon, and that he and his predecessors have had possession thereof. He exhibits his deed; which apparently covers the land in controversy.

Upon this evidence the court entered a decree perpetually enjoining and restraining the defendants from cutting and removing any timber from the tract of land described in the bill, and from otherwise trespassing thereon. From that decree the defendant, Henrietta Cumbee, appealed. So that the question is whether a court of equity should take jurisdiction of such a controversy.

While the principles governing this class of cases have been many times announced, and may be regarded as settled in Virginia, it is nevertheless difficult to apply them to the facts of this particular controversy.

In view, however, of the fact that the defendants relied solely upon their claim of title by adverse possession and failed to establish *prima facie* case (for their own evidence fails to show that they have had exclusive and hostile possession of the land here in controversy) should the court have dismissed the bill as presenting a mere controversy as to the title to the land, which could only be properly settled in an action of ejectment; or is this a case in which the chancery court properly took jurisdiction and granted the relief to which, upon the evidence submitted, the complainant is entitled?

The defendants only introduced two witnesses, and it is impossible to construe their testimony as making out a *prima facie* case in favor of the title by adverse possession set up in the answer. They not only failed to sustain the claim that the defendant, Henrietta Cumbee, "has been in the actual, open, notorious, visible, exclusive, hostile, undis-

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puted and continuous possession for a period of thirty years," but there is much in their testimony which supports the allegation of the bill, that the complainant and his predecessors in title were in possession of the property during the period in which she was also claiming it. Had the same evidence been introduced by a plaintiff in an action of ejectment, it would have been proper for the court to sustain a demurrer thereto. The occupancy which is necessary to support a claim of title by adverse possession must be both hostile and exclusive. *Austin* v. *Minor,* 107 Va. 109, 57 S. E. 609; *Gardner* v. *Montague,* 108 Va. 202, 60 S. E. 870; *Wheatton* v. *Doughty,* 112 Va. 649, 72 S. E. 12; *Providence F. Club* v. *Miller Co.,* 117 Va. 129, 83 S. E. 1047.

In a case like this, where both parties claim title and possession and both are exercising acts of ownership, and one fails to establish even a *prima facie* case, we are of opinion that in the interest of peace, law and order the equity court should take jurisdiction; and that in this case the trial court properly determined the question raised against the defendant's contention, which rests upon a claim of title, which is entirely unsustained, if not negatived, by the evidence introduced to support it. In view, however, of the fact that the record suggests the possibility that the defendants were overconfident in their view that the court of equity had no jurisdiction, and, therefore, failed fully to present the evidence upon which they relied in support of their claim of title, we are not disposed to close the door of opportunity to them. The decree will, therefore, be affirmed, without prejudice to the right of the defendants hereafter to assert their title to the property in an action of ejectment, if they shall be so advised.

Amended and affirmed.

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Staunton.

DENNIS v. ROBERTSON.

September 19, 1918.

1. TAXATION—*Sale—Effect of Tax Deed.*—A tax deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposes upon them—every condition essential in its character—then the deed becomes conclusive evidence of title to the grantee, according to its extent and purport. This is true because the officer of the law who executes the tax deed does so in the exercise of a naked power, not coupled with an interest; and, unless made so by statute, the recitals in the deed are not even *prima facie* evidence of the existence of the conditional facts aforesaid.
2. TAXATION—*Sale—Conveyance of Property Previously Acquired by Commonwealth.*—The principles as set forth in syllabus 1 apply to a tax deed which undertakes to convey the title of the Commonwealth (acquired by it at a previous sale of the land for delinquent taxes), to a purchaser from the Commonwealth, as well as to such deeds undertaking to convey the title of the original owner of the land to a purchaser at a treasurer's sale of the land for delinquent taxes. Equally in both cases, the officer of the law executing the deed to the third person, who is the purchaser, executes a naked power, and any steps which the statute requires a third person to take in order to acquire the title of the Commonwealth must be strictly complied with, unless the legislature dispenses with that compliance. The State is not to be divested of its title save in the manner prescribed by the legislature.

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3. TAXATION—*Tax Sale—Constitutional Law—Dispensing with Preliminary Steps.*—The preliminary steps to a tax sale for delinquent taxes by a treasurer, necessary to afford the landowner due process of law cannot be dispensed with even by express legislative enactment. They are necessary and indispensable to divest the former owner of his title to the land. But a different rule prevails where the Commonwealth has obtained a valid title to land and the deed is to a purchaser from it. In such case, the original owner having been divested of his title by due process of law and such title having become vested in the Commonwealth, the latter may do what it may will with its own. The former owner no longer has any title or right to the land or with respect thereto. Hence, where a tax deed conveys a title from the Commonwealth, the statute may provide that, when such a deed to a purchaser from it is once made, as prescribed by statute, its validity cannot be questioned by the former owner of the land on any grounds concerning any of the proceedings subsequent to the acquisition of the title by the Commonwealth, or on any grounds concerning the proceedings antecedent to such acquisition of title which do not go to the validity of the title acquired by the Commonwealth, except such as the statute may itself allow to be drawn in question.

4. TAXATION—*Tax Sale—Constitutional Law—Dispensing with Preliminary Steps.*—However, save to the extent that they may be dispensed with by statute, the proceedings which may be prescribed by statute as steps to precede the execution of such a tax deed, although they are to be taken after the acquisition of the title by the State, are nevertheless steps which are jurisdictional, and are conditions precedent to the validity of the deed. It becomes then, in every case involving the validity of a tax deed, purely a question of the construction of the statute which is relied on to give the particular force and effect which may be claimed for such a tax deed.

5. STATUTES—*Construction—Penal Statute.*—Statutes which are penal in their nature and entail forfeitures are to be strictly construed against the imposition of the penalty or the enforcement of the forfeiture.

6. TAXATION—*Deed from Commonwealth—Sections 661 and 666, Code of 1904.*—Some expressions used in the case of *Thomas* v. *Jones*, 94 Va. 756, 27 S. E. 813, and in other Virginia cases, did at one time give color to the view that where a tax deed is made to a purchaser from the Commonwealth under section 666 of the Code of 1904, as it originally stood or as amended, its validity could not be questioned, except upon the grounds specified in section 661 of the Code of 1904, as it originally

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stood or as amended, since said section 666 provides that the provisions of said section 661 should apply to deeds made under authority of the former section. But it is now well settled that the true construction of said sections 666 and 661 of the Code of 1904, as they originally stood and as amended, is, that the proceedings required by said section 666 of the Code of 1904 are conditions precedent to the validity of a deed thereunder.

7. TAXATION—*Deeds—Recitals—Sections 666 and 661, Code of 1904.*—The effect of sections 666 and 661, Code of 1904, is to make the recitals in the tax deed made and recorded under section 666 have the force and effect of *prima facie* evidence of the existence of the jurisdictional steps recited, but not conclusive evidence thereof, and such jurisdictional steps, in such case, are the steps required by said section 666 to be taken subsequent to the acquisition of the title by the Commonwealth and preceding the execution of the deed under such section.

8. TAXATION—*Deed from Commonwealth—Resale Act—Conditions Precedent to Validity of Deed.*—Under the resale act (Acts 1906, page 41), section 12, the requirements of the preceding portions of such act are as much conditions precedent to the validity of the deed, as are the non-existence of the facts mentioned in said section 12 as the grounds on which the validity of the deed may be assailed.

9. TAXATION—*Tax Deed—Recitals as Evidence—Resale Act, Section 10.*—The resale act (Acts 1906, page 41), section 10, provides that the deed shall set forth all the facts appearing of record in the clerk's office in relation to the sale. The effect of that provision and of section 12 of the act is to make the recitals in the tax deed, made and recorded under such act, *prima facie*, but not conclusive evidence of the existence of the jurisdictional steps recited.

10. TAXATION—*Tax Deed—Identity of Land Sold.*—Under Code of 1904, sections 662 and 663, the identity of the land to which the Commonwealth acquired title is fixed by the description of it contained in the list returned by the treasurer at the same time that he made his report of the sale of it to the Commonwealth. To the acquisition by anyone from the Commonwealth of its title to such land, by purchase under the resale act (Acts 1906, page 41), it is essential for many obvious reasons, that the identity of the land proposed to be purchased as the same land to which the Commonwealth had previously acquired title and proposed to sell, should be made to appear by a sufficient description of it for that purpose in the proceedings required by the act for the resale, as well as in the deed to the purchaser, required by such act.

11. TAXATION—*Tax Deed—Identity of Land Sold.*—Even a sub-

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stantial variance between the description in the deed and the description in the anterior proceedings (*a fortiori* an entire lack of such description in the anterior proceedings) will be fatal to the deed.

12. TAXATION—*Tax Deed—Identity of Land Sold.*—If the description in the deed contains substantially the same description as is contained in the anterior proceedings, that description may be enlarged, added to (as is authorized by section 10 of said resale act [Acts 1906, page 41]), by information derived from some source other than such proceedings; but the entire absence of any description in such proceedings cannot be supplied by the description contained in the deed, for that would be to base the deed, not upon such proceedings, as the statute requires for its validity, but upon information *aliunde*; which, whether correct or not, could not empower the officer of the law executing the deed in the exercise of a naked power to make a valid execution of it so as to pass title.

13. TAXATION—*Tax Deed—Identity of Land Sold—Section 10 of Resale Act.*—Section 10 of the resale act (Acts 1906, page 41) does not authorize a disregard of the rule that such a description as will identify the subject of a tax sale must be contained in the proceedings required by statute anterior to the tax deed. Such section contemplates that the clerk's list should contain at least the same description of the land as that contained in the report of the treasurer of its sale to the Commonwealth, or substantially that description, so as to identify the land, as the same as that to which the Commonwealth has title and which is proposed to be sold under the resale act (Acts 1906, page 41), such description may be enlarged by information derived from the purchaser, but its entire absence cannot be supplied by such information.

14. TAXATION—*Tax Deed—Identity of Land Sold—Case at Bar.*—In the instant case the clerk's list, the treasurer's notice of sale and report of sale required by the resale act (Acts 1906, page 41) were alike fatally defective in that they contained no description of the land in question. Only the name of the original landowner and the amount of the delinquent tax and levy stated, were given in the clerk's list. And with respect to the identity of the land only that information was given by the treasurer's notice of sale and report of sale. There was nothing in such proceedings to identify the land listed and sold, as the land to which the Commonwealth had title. To establish a valid sale of the land to him by the Commonwealth it was necessary for the appellant (the purchaser) to show such identity by the record of such proceedings, through which he must derive title, and the circumstance appearing by evidence

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in pais that the former landowner was not assessed with any other land, is immaterial because the said resale act (Acts 1906, page 41) does not permit the appellant to derive title by facts *in pais*, but only by the proceedings of record required by the statute.

15. TAXATION—*Tax Sale—Identity of Land Sold—Extraneous Evidence.*—Extraneous testimony is always admissible to apply the description in a tax deed, as in other deeds, to the subject of it, so as to identify the land on the ground; but this is a wholly different proposition from the admission of such testimony to identify the subject of a tax deed as the same which might or should have been described in the proceedings anterior to such deed required by statute to authorize the deed, but which description was not contained in such anterior proceedings.

16. TAXATION—*Tax Sale—Who may Maintain Suit to Cancel Deed—Removal of Cloud.*—Where the Commonwealth has obtained a good title to land as against its original owner; where the latter or those claiming under him have not redeemed the land, nor any for them; and there has been a tax deed, which is void, purporting to convey the title of the Commonwealth to another; the title still remains in the Commonwealth, and the former owner or those claiming the land under him cannot maintain a suit to cancel and remove the deed as a cloud upon the title to the land. The former owner, or anyone claiming under him, should first redeem the land as if the void tax deed had never been executed.

Appeal from a decree of the Circuit Court of Bedford county. Decree for complainant. Defendant appeals.

Reversed.

This suit was instituted by the appellee (plaintiff in the court below), to cancel a certain tax deed and remove the same as a cloud upon the title of the appellee to a certain lot of land purported to be conveyed thereby to appellant from the Commonwealth of Virginia.

THE MATERIAL FACTS.

The material facts of the case are as follows:

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The appellee, by mesne conveyances derived title to the lot in question from one W. H. Witt, the deed from the latter and wife being duly executed and recorded in June, 1907. Subsequently the lot was returned delinquent for non-payment of the tax and levy thereon for the year 1907. The lot was a town lot in Bedford City in the county of Bedford, being Lot 6 in Block 6 of what was known as the Greenwood Land Company Addition to said town and was designated as Lot 6 in Block 6 on the plat or subdivision of land made as provided by Acts of 1887-1888, chapter 486 (Code 1904, section 2510a), and acts amendatory thereof, and was owned by said W. H. Witt as of January 1, 1907, and at the time of the said conveyance from him in June of that year. The lot was assessed for taxation in 1907 in the name of its owner, W. H. Witt, under the description in the land book or tax list as "one-fourth acre Lot 6, b. 6, G. L. Co." It appears in evidence that the letters "G. L. C." was the usual abbreviation on the land books of said county to designate lots in said Greenwood Land Company Addition and plat or subdivision of land. It was returned delinquent as aforesaid under that description and subsequently it was advertised for sale, sold, bought by the Commonwealth and such sale to the Commonwealth reported by the treasurer to the court, according to law, and the description of the lot in all of these proceedings, including the list in the report of such delinquent sale under sections 662 and 663 of the Code, was substantially the same as that aforesaid under which the lot was assessed for taxation as aforesaid. The proceedings of such delinquent sale and purchase by the Commonwealth were completed in 1910 and were otherwise regular and in accordance with the requirements of law, so that the Commonwealth thereby obtained a good title to said lot, being by operation of law the same title which was vested in said W. H. Witt as of January 1, 1907, the appellee being thus divested of the title which he had derived or would otherwise have derived, by

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mesne conveyances as aforesaid, from said W. H. Witt. And the title to the lot identified by the description aforesaid thus stood vested in the Commonwealth prior to the institution of this suit.

Neither the appellee, nor the said W. H. Witt, nor anyone else under whom appellee claims title as aforesaid, nor any for them or for any of them, ever redeemed said land from the sale of it aforesaid to the Commonwealth.

After the expiration of over four years from the purchase of said lot by the Commonwealth as aforesaid, the same not having been redeemed by or sold to any one, certain proceedings were had under Acts 1906, chapter 52, page 41 *et seq.* for the sale of town lots within the county of Bedford.

The clerk's list in the case before us, so far as material, was as follows:

"A list of all town lots within the county of Bedford and of all lots which are a part of some plat or subdivision of land, made as provided by Acts of 1887-1888, chapter 486 and acts amendatory thereof whether within the corporate limits of the town or city or not, which have been purchased by the Commonwealth for delinquent taxes more than four years prior to January 1, 1915, and which have not been redeemed, except such lots as have been heretofore sold under this act and such as were reported for sale, but redeemed before the sale, showing the persons in whose names the lots stood at the time of the purchase by the Commonwealth, and the amount required to redeem each of the said lots, including amount of taxes due for the year in which the lot was sold, and the amount due the State and county respectively stated in separate columns.

"Name of persons charged with taxes in whose name land is sold: Witt, W. H.

"Quantity of land charged: .....

"Quantity of land sold: .....

"Local description of land: .....

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"1907, .12, .16. Total, 28."

The treasurer's notice of sale, so far as material, was as follows:

"Commonwealth's sale of delinquent lots.

"The following mentioned lots within Bedford county, which have been purchased by the Commonwealth for delinquent tax, more than four years prior to January 1, 1915, and which have not been redeemed, will be offered for sale to the highest bidder, on

"Wednesday, December 1, 1915,

as per act of 1906.

"Witt, W. H. .....31."

The treasurer's report of sale, so far as material, was as follows:

"A list of town lots purchased by the Commonwealth *four years prior to 1914* not redeemed and were sold at auction to the highest bidder on December 1, 1915.

"Names of persons charged with taxes in whose name land was sold:

"Witt, W. H.

"Quantity of land charged: .....

"Quantity of land sold: .....

"Total for county 1907. State, .12; county, .16.

"Total for county, .28; .02; .30.

"Remarks: Chas. Dennis, .02."

The tax deed aforesaid was as follows:

"This deed, made this the 3rd day of July, 1916, between S. M. Bolling, clerk of the Circuit Court for Bedford county, Virginia, party of the first part, and Charles Dennis, party of the second part,

"Whereas, one-fourth acre of land described as Lot 6, Block 6, G. L. Co., was duly listed for taxation in the year 1907, in corporation district in Bedford county, Virginia, in the name of W. H. Witt, the owner thereof, and

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"Whereas, such taxes on said land not being paid for said year, the same were duly reported as delinquent, and

"Whereas, on the 3rd day of January, 1910, the said land was duly sold at a delinquent tax sale by the treasurer of said county at which sale the said land was purchased by the Commonwealth of Virginia, and

"Whereas, more than four years having elapsed after such purchase by the Commonwealth aforesaid, prior to the first day of January, 1915, the clerk of said court did prepare a list of all town and city lots purchased by the Commonwealth at delinquent tax sales, more than four years prior to the first of January, 1915, and which had not been redeemed, in conformity with the act of Assembly of Virginia, approved February 23, 1906, and

"Whereas, said clerk did deliver such list to the treasurer of said county not later than the first day of September, 1915, and said treasurer did thereupon duly post copies of said list as required by said act, and did give due notice that he would sell said land at public auction, as directed by said act, unless the said land be previously redeemed, and

"Whereas, the said parcel of land so listed for taxation in the name of W. H. Witt, and so purchased by the Commonwealth aforesaid, was duly listed and posted as aforesaid, and was offered for sale at public auction by said treasurer to the highest bidder on the first day of December, 1915, as directed by said act at which *at which* sale the said Charles Dennis became the purchaser, but no description of the land or lot so sold is given in the treasurer's report of sale, at the price of two cents, which sum was by said purchaser duly paid to said treasurer, and

"Whereas, the said treasurer did duly report said sale to the Circuit Court of Bedford county, Virginia, as prescribed and directed by said act, and

"Whereas, the said court did on the first day of March, 1916, confirm said report and ordered it to be recorded and

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indexed as required by said act, which order has been complied with by said clerk, and

"Whereas, four months having elapsed since said confirmation of said report, and the real estate so sold to Charles Dennis not having been redeemed as provided in said act, and the said Charles Dennis having applied to said clerk for a deed conveying said land to him,

"Now, this deed witnesseth: That in consideration of the premises and of one dollar in hand paid, and in the execution of the duty of said clerk, the said S. M. Bolling, clerk as aforesaid, doth grant with special warranty unto the said Charles Dennis, what he purchased at said sale, the report of sale not giving any description of what was sold to him. The purchaser furnished the following description as being the proper description of the lot purchased by him, to-wit: as being Lot No. 6, Block 6, map of Greenwood Addition to Bedford City, fronting fifty feet on Judd street and running back 185 feet, found in Deed Book 90, page 573.

"Witness the following signature and seal:

"(Signed) S. M. BOLLING (Seal)

"Clerk of the Circuit Court of

"Bedford county, Virginia."

Among the facts relied on by appellant is the following: It was alleged and shown by proof in the case that the said W. H. Witt was not assessed for taxation in 1907 with any other tract or parcel of land in Bedford county than said "one-fourth acre, Lot 6, Block 6, G. L. C. Co." lot.

Upon the hearing of the cause on the merits the court below entered the decree complained of, which was, in substance, that the tax deed aforesaid was void and that the appellee was entitled to the relief sought by his suit, as aforesaid; and the appellant brings error.

Thos. W. Miller, for the appellant.

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Landon Lowry, for the appellee.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court.

The assignments of error raise but two questions for our consideration, which will be hereinafter stated and decided.

As appears from the above statement this is a case in which the Commonwealth acquired a valid title to the lot in question at a sale of it for delinquent taxes at which it was bought by the Commonwealth. No question arises as between the Commonwealth and the former owner of the lot, or appellee claiming under the latter by mesne conveyances, on that subject. We set out, therefore, upon our consideration of the case, with the Commonwealth as the owner of such lot.

The first question for our consideration is:

1. Was the Commonwealth divested of its title to the lot in question by the tax deed to appellant?

There are certain general principles applicable to tax titles which are well settled but which should be borne in mind in approaching the consideration of the first question involved in the instant case.

As stated in 2 Blackwell on Tax Titles, section 845, a tax deed, "* * * according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have

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performed every duty which the law imposes upon them—every condition essential in its character—then the deed becomes conclusive evidence of title to the grantee, according to its extent and purport."

This is true because the officer of the law who executes the tax deed does so in the exercise of a naked power, not coupled with an interest; and, unless made so by statute, the recitals in the deed are not even *prima facie* evidence of the existence of the conditional facts aforesaid. *Flanagan* v. *Grimmett*, 10 Gratt. (51 Va.) 421, 425-6; *Sulphur Mines Co.* v. *Thompson*, 93 Va. 293, 316, 25 S. E. 232.

And such rule applies to a tax deed which undertakes to convey the title of the Commonwealth (acquired by it at a previous sale of the land for delinquent taxes) to a purchaser from the Commonwealth, as well as to such deeds undertaking to convey the title of the original owner of the land to a purchaser at a treasurer's sale of the land for delinquent taxes. 2 Blackwell on Tax Titles, section 845; Minor on Tax Titles, page 84. Equally in both cases, the officer of the law executing the deed to the third person, who is the purchaser, executes a naked power, and, as stated by Mr. Minor on page 84 of his work last cited "* * * any steps which the statute requires a third person to take in order to acquire the title of the Commonwealth must be strictly complied with, unless the legislature dispenses with that compliance. The State is not to be divested of its title save in the manner prescribed by the legislature."

It is very true, as correctly pointed out elsewhere in the valuable work last quoted, that touching the power of the legislature to dispense with certain anterior proceedings as prerequisites to a valid tax deed, an entirely different case presents itself when it is one where the Commonwealth has obtained a valid title and the deed is to a purchaser from it, from that of a case of a deed to a purchaser at a delinquent tax sale by a treasurer. In the latter case there are certain

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constitutional limitations on the power of the legislature which protect the rights of the individual land owner. These limitations concern the preliminary steps to a tax sale necessary to afford the land owner "due process of law" and cannot be dispensed with even by express legislative enactment. They are necessary and indispensable to divest the former owner of his title to the land and are also referred to by Minor on Tax Titles, pages 127-155. In the former case, the original owner having been divested of his title by due process of law and such title having become vested in the Commonwealth, the latter may do what it may will with its own. In such case the former owner no longer has any title or right to the land or with respect thereto. The circumstance that the Commonwealth may by statute give the former owner the right (so called) of redeeming the land by performing certain stipulated acts, so long as the title remains in the State; or may require that any purchaser from the State shall give a certain notice to the original owner to redeem before such purchaser can obtain a deed, or that any other right (*sic*) pertaining to the land is thus given, does not alter the situation. These are all matters of grace and of privilege and are not in truth matters of right in the former owner. At most they are *rights* if asserted by the former owner in the way and within the time prescribed by statute. The State may provide by statute that at a certain stage in the proceedings subsequent to the acquisition of the title by it, such quasi-rights no longer exist. Since the State need not have granted such quasi-rights at all, it may grant them in a limited way or for a limited time, and, so far as the original owner is concerned, he is without ground of complaint if these are denied to him, by or under legislative enactment, at any time after the State has acquired the title. Hence, where a tax deed conveys a title from the Commonwealth, the statute may provide that, when such a deed to a purchaser from it is

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once made, as prescribed by statute, its validity cannot be questioned by the former owner of the land on any grounds concerning any of the proceedings subsequent to the acquisition of the title by the Commonwealth, or on any grounds concerning the proceedings antecedent to such acquisition of title which do not go to the validity of the title acquired by the Commonwealth, except such as the statute may itself allow to be drawn in question. *Idem,* pages 84, 147, 151, 155; *Thomas* v. *Jones,* 94 Va. 756, 27 S. E. 813; *Lacks* v. *Latham,* 116 Va. 424, 82 S. E. 75.

But all this concerns merely *the power* of the State to control the subject of the effect of a tax deed where it conveys a title from and which has been previously vested in the State. The question still remains to what extent such power has been exercised, when we come to construe any particular statute on the subject. Save to the extent that they may be dispensed with by statute, the proceedings which may be prescribed by statute as steps to precede the execution of such a tax deed, although they are to be taken after the acquisition of the title by the State, are nevertheless steps which are jurisdictional, and are conditions precedent to the validity of the deed. It becomes then, in every case involving the validity of a tax deed, purely a question of the construction of the statute which is relied on to give the particular force and effect which may be claimed for such a tax deed.

Some expressions used in the case of *Thomas* v. *Jones, supra,* 94 Va. 756, 27 S. E. 813, and in other Virginia cases, did at one time give color to the view that where a tax deed is made to a purchaser from the Commonwealth under section 666 of the Code, as it originally stood or as amended, its validity could not be questioned, except upon the grounds specified in section 661 of the Code, as it originally stood or as amended, since said section 666 provides that the provisions of said section 661 should apply to deeds

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made under authority of the former section. And such construction was indeed placed upon the holding in said case of *Thomas* v. *Jones,* by Mr. Minor in his valuable work above cited. See Minor on Tax Titles, page 147. But it is now well settled that the true construction of said sections 666 and 661 of the Code, as they originally stood and as amended, is, that the proceedings required by said section 666 of the Code are conditions precedent to the validity of a deed thereunder. This holding has been reached by applying the principle that statutes which are penal in their nature and entail forfeitures are to be strictly construed against the imposition of the penalty or the enforcement of the forfeiture. That so construing said section 661, and the language therein, "when the purchaser of any real estate * * * sold in pursuance of section 666 * * * has obtained a deed therefor * * * the right or title to such real estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made at the commencement of the year for which the taxes or levies were assessed, or any person claiming under such party, subject to be defeated only by proof * * *" etc. (setting forth certain facts which may be received in evidence to invalidate the deed), its true meaning is that the real estate has not been sold "in pursuance of section 666" unless the requirements of the latter section have been complied with; and, hence, such requirements are as much conditions precedent upon which the validity of a deed thereunder depends as is the non-existence of the facts mentioned in section 661 of the Code as grounds on which the validity of the deed may be assailed. *Zimmerman* v. *Dey,* 121 Va. 709, 93 S. E. 597, and authorities therein cited.

In the last cited case there was a careful consideration of many decisions of this court touching the subject of the paragraph next above, which, therefore, need not be here

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again reviewed. And, as noted in the opinion of this court delivered by Judge Kelly in the last cited case, the extent to which the case of *Thomas* v. *Jones, supra*, 94 Va. 756, 27 S. E. 813, carried the curative force of section 661 of the Code, has subsequently been greatly qualified, if not entirely overruled.

There is a provision in said section 666 that the deed "* * * shall set forth all the circumstances appearing in the clerk's office in relation to the sale," and it is settled that the effect of said sections 666 and 661 is to make the recitals in the tax deed made and recorded under section 666 have the force and effect of *prima facie* evidence of the existence of the jurisdictional steps recited, but not conclusive evidence thereof. *Thomas* v. *Jones*, 98 Va. 323, 36 S. E. 382; *Zimmerman* v. *Dey, supra*, and authorities therein cited. And such jurisdictional steps, in such case, are the steps required by said section 666 to be taken subsequent to the acquisition of the title by the Commonwealth and preceding the execution of the deed under such section. *Lacks* v. *Latham, supra*, 116 Va., at page 427, 82 S. E. 75.

The instant case involves a tax deed made under what is commonly designated the resale act (Acts 1906, page 41) approved February 23, 1906. This act is complete in itself and does not refer to said section 661 of the Code; but it contains in section 12 thereof practically the same provisions as the original section 661 of the Code before the latter was amended. Such section 12 of such act so far as material, is as follows:

"12. When the purchaser of any real estate *so sold* * * * has obtained a deed therefor * * * the right or title to such real estate shall stand vested in the grantee in such deed, as it was vested in the party assessed with the taxes and levies thereon at the commencement of the year for which the taxes or levies were assessed for which it was sold, or any person claiming under such party, subject to be

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defeated only by proof," * * * etc. (setting forth certain facts which alone may be received in evidence to invalidate the deed, which are the same as set forth in section 661 of the Code as it was originally enacted and before amendments thereto added certain other grounds on which the validity of the deeds referred to in the latter might be assailed). (Italics supplied.)

We are of opinion that the language "so sold" in the latter act, means "sold in pursuance" of such act. Hence the same construction which this court has given to section 661 of the Code aforesaid, must be given to section 12 of the act now under consideration; and that is that the true construction of such section is that the requirements of the preceding portions of such act are as much conditions precedent to the validity of the deed, as are the non-existence of the facts mentioned in said section 12 as the grounds on which the validity of the deed may be assailed.

There is nothing in the case of *Roller* v. *Cooley*, 119 Va. 209, 89 S. E. 136, which is in conflict with the conclusion above reached. The latter case involved said resale act; and it is true that among the recitals in the tax deed made under such act was a recital that the Commonwealth obtained its title to the lot in question under a certain previous sale of it for delinquent taxes under which the Commonwealth did not in fact obtain its title. That title was obtained under another delinquent tax sale. Such recital therefore was erroneous. But that error was held to be immaterial because it concerned a proceeding which was prior to and was not embraced in the proceedings under said resale act; that the proceedings required by such act to be set forth in a deed under it are only those transpiring after the Commonwealth had obtained its title and which are mentioned in the act.

In the case last mentioned there was no question but that the proceedings under the resale act touching the steps

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required by such statute subsequent to the acquisition of its title by the Commonwealth and under which the tax deed under such statute was made, were all regular and in accordance with the requirements of the statute (consisting of a proper clerk's list, treasurer's notice of sale, sale, and report of sale, properly identifying the land, etc.); and hence it was held that the bar of section 12 of the statute applied and that the tax deed to the purchaser thereunder from the Commonwealth could be defeated only by proof of the existence of the facts mentioned in such section as grounds on which the validity of the deed could be assailed, viz: by proof that the taxes or levies for which the lot was sold to the Commonwealth were not properly chargeable thereon, or that the taxes and levies chargeable on such real estate had been paid.

There is a provision in section 10 of said act that the deed "* * * shall set forth all the facts appearing of record in the clerk's office in relation to the sale," similar to the provision on that subject in section 666 of the Code, and the effect of that provision and of section 12 aforesaid is to make the recitals in the tax deed, made and recorded under such act, *prima facie*, but not conclusive evidence of the existence of the jurisdictional steps recited.

Now the jurisdictional steps required by the provisions of the act under consideration, other than section 12 thereof, are, so far as material, in substance as follows:

By section 1 the clerk of the circuit court of each county is required annually to "* * * prepare a list of all town lots * * * within his county * * * and of all lots which are a part of some plat or subdivision of land, made as provided by acts of eighteen hundred and eighty-seven and eighteen hundred and eighty-eight, chapter four hundred and eighty-six and acts amendatory thereof, whether within the corporate limits of a town * * * or not, which have been purchased by the Commonwealth for delinquent

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taxes for more than four years prior to January first of the year in which such list is made, and which have not been redeemed; and said list shall show the person in whose name the lot stood at the time of the purchase by the Commonwealth, and the amount required to redeem each of said lots, including the amount of taxes due for the year in which such lot is sold, and the amount due the State, county and corporation, respectively, shall be stated in separate columns * * *."

Section 2 provides that said list shall be delivered by the clerk to the treasurer not later than a certain date each year: that the treasurer of the county shall within a certain time thereafter post printed copies of such list at the front door of the court house and at least five public places in each magisterial district of the county; and that to each copy "the treasurer shall attach a notice that *the real estate therein mentioned,* or so much of each parcel thereof as may be necessary to satisfy the amount required to redeem the same * * * will be sold * * *" at a certain time and place to be set forth in the notice "unless the amount required to redeem said lots * * * shall have been previously paid to such treasurer." (Italics supplied.)

Section 4 provides that—"The treasurer on receiving from such purchaser the amount of his purchase, shall give him a receipt for the same in which he shall set forth *with reasonable certainty a description of the lot sold,* in whose name it was sold, the price paid and the amount required to redeem the said lot as aforesaid * * *." (Italics supplied.) It will be noted that the only source mentioned in the statute from which the treasurer could obtain this *data* is the clerk's list aforesaid.

Sections 5 and 6 provide for a report of the treasurer of his sales, for confirmation of same by the court, after correcting them "when there is error," and for recordation thereof.

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The further material provisions of the resale act are as follows:

Section 10 provides that after and within a certain time, "if the real estate *so sold* has not been redeemed * * * the purchaser of any such real estate, his heirs or assigns, shall obtain from the clerk of the circuit court of the county * * * whose officer has sold such real estate, a deed conveying the same, in which shall be set forth all the facts appearing of record in the clerk's office in relation to the sale. *The deed shall describe the lot with reference to the plat of subdivision of which it forms a part and according to which it was sold,* or *in such other way as will definitely describe it,* and such information as may be necessary for such description, *not appearing in his office, shall be furnished to the clerk by the purchaser* at his own cost."

Section 11 provides that if a deed is not made within the time prescribed by section 10 the former owner, etc., may thereafter and before such deed is made redeem the lot as provided for in such section.

Section 14 provides that if there is an excess of purchase money from the sale of a lot above the amount required to redeem same as in the act provided the former owner of the lot shall be entitled thereto if called for within five years after confirmation of report of sale.

The identity of the lot to which the Commonwealth acquired title in the instant case was fixed by the description of it contained in the list returned by the treasurer at the same time that he made his report of the sale of it to the Commonwealth. Sections 662 and 663 of the Code of Virginia (Pollard's Code, 1904); *Minor on Tax Titles,* page 148.

To the acquisition by anyone from the Commonwealth of its title to such lot, by purchase under said resale act, it is essential, for many obvious reasons, that the identity of the lot proposed to be purchased as the same lot to which the

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Commonwealth had previously acquired title and proposed to sell, should be made to appear by a sufficient description of it for that purpose in the proceedings required by the act for the resale, as well as in the deed to the purchaser, required by such act.

That such is the requirement of said act is apparent from a reading of it as a whole. Indeed the requirement of the list of lots subject to sale under the act, by necessary implication, is a requirement of a valid list for that purpose. No list would be valid for such purpose unless it contained the sufficient description aforesaid, for that is the chief purpose and object of such a list. That section 1 of the act requires the list to show certain things expressly mentioned, but does not mention such description among them, does not controvert that conclusion, for the obvious reason that the legal import and meaning of the very word "list" aforesaid when used in its context in the statute, rendered it unnecessary for the statute to expressly require that it should contain a description of the lot or lots contained in the list. Without some description of them, indeed, it could not be a list of such lot or lots. Moreover, the language of sections 2, 4 and 10, italicized in the above quotations therefrom, make it plain, as aforesaid, that the act requires the lists to contain a description of the lot or lots to be sold and conveyed.

That such a description as will identify the subject of the tax sale is absolutely essential to be contained in the proceedings required by statute anterior to the tax deed, in order that the deed may be valid to pass the title from the former owner to a purchaser at a delinquent tax sale by a treasurer, is well settled. Such anterior proceedings, in such case, and the tax deed, are regarded as an entirety, and the description of the subject of the tax sale must be consistent throughout. The power of sale, and the power of conveyance depend upon such identification of the subject

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matter thereof. Even a substantial variance between the description in the deed and the description in the anterior proceedings (*a fortiori* an entire lack of such description in the anterior proceedings), will be fatal to the deed. If the description in the deed contains substantially the same description as is contained in the anterior proceedings, that description may be enlarged, added to (as is authorized by section 10 of said resale act), by information derived from some source other than such proceedings; but the entire absence of any description in such proceedings cannot be supplied by the description contained in the deed, for that would be to base the deed, not upon such proceedings, as the statute requires for its validity, but upon information *aliunde*, which, whether correct or not, could not empower the officer of the law executing the deed in the exercise of a naked power to make a valid execution of it so as to pass title. 2 Blackwell on Tax Titles, sections 874, 875; Minor on Tax Titles, pages 120-1; *Boon* v. *Simmons*, 88 Va. 259, 266, 13 S. E. 439. The same rule must necessarily obtain with respect to a tax deed passing title from the Commonwealth under said resale act, as well as under section 666 of the Code, since such statutes themselves make the tax deed depend for its validity upon the requirements of those statutes being complied with, as aforesaid.

And while section 10 of the said resale act, if read alone, might be construed to authorize the disregard of the rule next above adverted to, when read in the light of the other provisions of such statute having for their object the identification of the lot conveyed, and in the light of the authorities disclosing the legal principle involved, it is plain that such section does not authorize the disregard of such rule. We think that such section contemplates that the clerk's list should contain at least the same description of the lot as that contained in the report of the treasurer of its sale to the Commonwealth, or substantially that description, so as

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to identify the lot, as the same as that to which the Commonwealth has title and which is proposed to be sold under the resale act, that such description may be enlarged as aforesaid, by information derived from the purchaser, but its entire absence cannot be supplied by such information, as aforesaid.

In the instant case the clerk's list, the treasurer's notice of sale and report of sale required by said resale act were alike fatally defective in that they contained no description of the lot in question. Only the name of the original land owner and the amount of the delinquent tax and levy stated, were given in the clerk's list. And with respect to the identity of the land only that information was given by the treasurer's notice of sale and report of sale. There was nothing in such proceedings to identify the lot listed and sold, as the lot to which the Commonwealth had title, as aforesaid. To establish a valid sale of the lot to him by the Commonwealth it was necessary for the appellant to show such identity by the record of such proceedings, through which he must derive title.

The circumstance appearing by evidence *in pais* that the former land owner was not assessed for 1907 with any other land as set forth in the statement of facts above is immaterial because the said resale act does not permit the appellant to derive title by facts *in pais*, but only by the proceedings of record aforesaid required by the statute. See *Nowlin* v. *Burwell*, 28 Gratt. (69 Va.) 883-889.

It is true that under a well-settled rule, extraneous testimony is always admissible to apply the description in a tax deed, as in other deeds, to the subject of it, so as to identify the land on the ground; but this is a wholly different proposition from the admission of such testimony to identify the subject of a tax deed as the same which might or should have been described in the proceedings anterior to such deed required by statute to authorize the deed, but

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which description was not contained in such anterior proceedings. For the reasons above stated such omission of description cannot be supplied by including in the deed a description which is extraneous to the record.

Therefore the tax deed to appellant involved in the instant case, was void and passed no title from the Commonwealth. It left the title to the lot in question still vested in the Commonwealth. In the holding of the decree complained of to this effect there was no error. But,

This brings us to the consideration of the remaining question raised by the assignments of error for our consideration, and that is—

2. Could the appellee, who had not, nor had anyone for him, before he instituted this suit, redeemed the lot in question from its sale to the Commonwealth, maintain this suit to cancel and remove the deed aforesaid as a cloud upon his title?

It is well settled that where the Commonwealth has obtained a good title to land as against its original owner; where the latter or those claiming under him have not redeemed the land, nor any for them; and there has been a tax deed, which is void, purporting to convey the title of the Commonwealth to another; the title still remains in the Commonwealth, and the former owner or those claiming the land under him cannot maintain a suit to cancel and remove the deed as a cloud upon the title to the land. *Roller* v. *Cooley*, 119 Va. 209, 89 S. E. 136; *Mathews* v. *Glenn*, 100 Va. 352, 41 S. E. 735; *Parsons* v. *Newman*, 99 Va. 298, 38 S. E. 186; *Baker* v. *Buckner*, 99 Va. 368, 38 S. E. 280.

The certain quasi-rights given to the former owner of the land and to appellee claiming under him by said resale act, notwithstanding the ownership thereof by the Commonwealth, are rights of the same nature as those enjoyed by the parties occupying the same relationship to the land in the cases last cited, under similar statute law; and yet they

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were held to have no right to maintain a suit such as that before us unless and until they or some one for them, had divested the Commonwealth of its title and vested it in themselves by redemption of the land as provided for by statute.

Such is the instant case and the position of appellee at the time that he instituted this suit. Hence the question under consideration must be answered in the negative.

The suit of appellee, therefore, was prematurely brought. He should have first redeemed the lot in question as the statute provides, by proceedings to that end, as if the tax deed to appellant had never been executed.

The decree complained of must therefore be set aside and annulled, without prejudice, however, to the appellee to redeem the lot in question according to law and to thereafter institute his suit against the appellant should he be so advised, to cancel and remove the deed aforesaid as a cloud upon the title to the lot, unless the need of such suit be obviated by proper voluntary action on the part of appellant, before such suit is instituted by quit-claim deed or otherwise.

Reversed.

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Staunton.

ELLIS AND MEYERS LUMBER COMPANY v. HUBBARD AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. SALES—*Executory Contract—Subject of Sale not in Existence.*—Where lumber, the subject of a contract of sale, was not in existence at the time the contract was made, the subject of the contract, therefore, was not specific at that time, and the conditions specified in the contract being unperformed, the contract with respect to all of its conditions was entirely executory. To convert this executory contract into a complete bargain and sale of the lumber, so as to pass title to the vendees, two things only were essential: First, that the lumber should become specific—*i. e.*, that it should come into existence and be segregated and set apart as the subject of the contract; and second, the performance of the other conditions precedent, if any, to the passing of the property or title, as stipulated in the contract.
2. SALES—*When Title Passes—Specific Subject Matter—Intention.*—That the subject thereof must be specific is essential to the validity of every contract of bargain and sale. It inheres in the very nature of the transaction that a bargain and sale cannot be made of chattels not yet identified—the ownership cannot change, the property or title cannot pass, until the particular property which is the subject of the contract becomes ascertained. This is true independently of the intention of the vendor and vendee. So long as the subject of the contract remains undetermined, the law will conclusively presume that the contract is executory, and no property or title can pass from vendor to vendee. This, however, is the sole element in such a contract which is independent of the intention of the parties.
3. SALES—*When Title Passes—Intention of the Parties—Subject of Sale Specific.*—When the subject of a contract of sale is or has become specific, whether or not the property or title thereto passes becomes wholly a matter of the mutual intention of the

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parties, vendor and vendee—wholly a matter of contract between them. In such case, neither delivery of the chattel to the vendee, nor the completion of its manufacture, or anything else to be done to it so that it may be ready for such delivery, nor the measurement or testing of it (when it is to be measured or tested in any way), nor anything further to be done to ascertain the quality, or the quantity, or the price; nor the payment of the purchase money, or any part of it, is essential to the passing of the property or title to the vendee, if the contract provides it shall so pass at a stated time and when the chattel is in a condition stated in the contract. The conditions stipulated in the contract as to these matters are the sole conditions precedent to the passing of the property or title, all other conditions precedent being thereby waived; the vendor being bound by the contract to pass and the vendees to accept the property and title thereto when such conditions have been performed or exist—and hence the property or title then passes to the vendees under the terms of the contract.

4. SALES—*When Title Passes—Intention of the Parties—Subject of Sale Specific—Case at Bar.*—In the instant case, the lumber, which was the subject of the contract, after it came into existence by being sawed, was piled on sticks on certain land leased by the vendees, as provided for in the contract—which was away from the mill and other lumber of the vendor—there being no other lumber than that which was the subject of the contract on such land. The lumber was thus segregated and set apart by delivery on the leased land, and this was in legal phrase the appropriation of specific goods to the contract, the sole element deficient in a perfect sale was thus supplied. And this was done, not under subsequent mutual agreement of the parties—which would have been sufficient to convert the prior executory contract into a complete bargain and sale—but under the very terms of the contract in writing, which expressly provided that the title should then pass to the vendees.

5. SALES—*Construction—Intention of Parties.*—The agreement is just what the parties intend to make it, if that intention is clearly and unequivocally manifested, *cadit questio.*

6. SALES—*Conditions Subsequent—When Title Passes.*—A complete bargain and sale of chattels may be made subject to a condition subsequent that the chattels shall conform to any stipulated specifications. In such case, the title to the chattels passes at the time of the bargain and sale, notwithstanding the fact that the sale is subject to be defeated in whole or in part by the failure of the chattels to fulfil the stipulated specifications, when such fact is subsequently ascertained. The bargain and sale in such case is a conditional one, to be sure; but the con-

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dition is a subsequent and not a precedent condition to the passing of the title, and in no way prevents the latter taking place.

7. SALES—*When Title Passes—Lord Ellenborough's Rules.*—Where the contract of sale is express, plain and unequivocal, Lord Ellenborough's famous rules to determine the intention of the parties as to when the property or title of the subject of the sale shall pass, are inapplicable, since they do not have to be resorted to in order to ascertain the intention of the parties to the contract.

8. SALES—*When Title Passes—Conditions Precedent to Payment Distinguished from Conditions Precedent to Passage of Title—Case at Bar.*—In the instant case all of the provisions of the contract relied on for appellees as conditions precedent to the passing of the property or title thereto, appear from the contract itself as conditions precedent only to the payment in full of the purchase money, and not to the passing of the property or title thereto—a wholly different thing. The only conditions precedent to the passing of the property or title, as expressly provided in the contract, were those and those only which were to serve to segregate and identify the lumber—to appropriate it, as the subject of the contract.

9. ESTOPPEL—*Assignment—Title to Lumber Sold.*—The vendor of lumber made an assignment for the benefit of his creditors and included in the assignment "all the remainder of the purchase price due" from the vendees. Under the contract of sale title to the lumber had passed to the vendees.

Held: That the acquiescence of the vendees in the assignment did not estop them from asserting title to the lumber, or any right of set-off against the purchase money for such lumber by reason of any advances or loans made by them to the vendor of the lumber under the contract.

10. ESTOPPEL—*Assignment—Title to Lumber Sold.*—Nor, under these circumstances, will the acquiescence of the vendees in the delivery of the lumber by the trustees at the shipping point specified in the contract, and its inspection and acceptance by them, estop the vendees from asserting their title to the lumber, where by the terms of the contract of sale, if the vendor failed to deliver the lumber at the shipping point, the vendees were authorized to do so and deduct the expense thereof from the amount due the vendor.

11. ESTOPPEL—*Answer in Garnishment Proceedings—Title to Lumber.*—The answer of vendees in garnishment proceedings admitting a balance of indebtedness under the contract of sale to the vendor is not inconsistent with vendees' claim of title to the lumber itself under the contract of sale or their right

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to charge the vendor with any advances or loans the vendees may have made to him under the contract of sale or otherwise.

12. IMPLIED CONTRACTS—*Where Express Contracts Exist.*—Where there is an express and enforceable contract in existence which governs the rights of the parties, the law will not imply a contract in contravention thereof. It is only in the absence of an express or of an enforceable contract between parties, that the law (whether at law or in equity) will, from circumstances, imply a contract between them.

13. SALES—*Advances by Vendees.*—Where by a contract of sale the vendees bound themselves to lend a certain sum to the vendor as an advance upon the purchase money for the subject of the sale, the vendees are not prohibited from making further advances to the vendor, and having done so, prior to a deed of assignment by the vendor, the vendees have an equitable right to set off such further advances against the vendor in any settlement of accounts with him, and have the same right against the trustee in the deed of assignment.

Appeal from a decree of the Circuit Court of Russell county. Decree for complainants. Defendant appeals.

Reversed and remanded.

The controversies in this cause grew out of the following contract between one B. F. Morgan and appellants, viz:

"This agreement, made this 6th day of December, 1912, by and between B. F. Morgan, of Honaker, Virginia, party of the first part, and the Ellis and Myers Lumber Company, party of the second part.

"Witnesseth: That the party of the first part has this day sold to the party of the second part *400,000 feet of oak, poplar and chestnut lumber of own manufacture cut and to be cut and delivered to party of second part out of V. B. Meade and J. W. Hubbard timber, said mill being on J. W. Hubbard's land on south side of Chestnut Ridge,* the said saw-mill being E. S. Wilson's and Kenser Fuller's to be paid by the said party of the second part upon the following terms and conditions, to-wit:

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"All 4-4 stock must be of good average lengths and widths, the terms of which is meant largely 14 and 16′ lengths, the remainder may be 8, 10 and 12′ with as little 8 and 10 lengths as possible. Widths must be as good as can be obtained from the logs.

"The said 4-4 stock must be graded according to the National Hardwood Lumber Association rules and full car loads of each grade and kind of wood must be loaded separately in the car at shipping point, the price to be as follows:

"4-4 No. 2 common and S. W. chestnut at $9.00 per 1000′ less 2 per cent.

"4-4 No. 1 common and S. W. chestnut at $25.00 per 1000′ less 2 per cent.

"4-4 No. 1s and 2s chestnut at $38.00 per 1000′ less 2 per cent.

"4-4 No. 1s and 2s poplar at $46.00 per 1000′ less 2 per cent.

"4-4 sap poplar at $33.00 per 1000′ less 2 per cent.

"4-4 No. 1 common poplar at $25.00 per 1000′ less 2 per cent.

"4-4 1s and 2s oak at $38.00 per 1000′ less 2 per cent.

"4-4 No. 1 common oak at $25.00 per 1000′ less 2 per cent.

"4-4 No. 2 common oak at $15.00 per 1000′ less 2 per cent.

"Export oak: 3½ x 12-10′ and up long and 5 x 12-15′ 6″ and up at $21.00 5 x 12-6′ 4″, 12′ 8″, 14′ 6″ at $18.00.

"All stock must be well manufactured, cut plump to thickness, well edged and trimmed and to be first-class merchantable articles, under the rule of each grading.

"The party of the first part agrees to use great care and not knowingly deliver any No. 2 and No. 3 common in the poplar and any No. 3 common in the oak and chestnut and the party of the second part shall cause all timber shipped

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to be carefully examined and inspected at the shipping point in case any lumber so examined and inspected, shall be found and determined by the inspector at shipping point to be below the grade called for in this contract, then the party of the first part shall remove and take of the same at his own risk. The party of the first part further agrees to *lease to the party of the second part* until one year from date *some suitable and convenient place of land on top of Chestnut Ridge and location to be mutually agreed upon the parties hereto. The delivery of the said lumber shall be made by the party of the first part to the party of the second part by piling the same on sticks in a workmanlike manner and in a good substantial manner upon said land, whereupon the delivery of said lumber shall be deemed complete, and said lumber shall thereupon become and thenceforth remain the property of the party of the second part absolutely and unconditionally.* The said party of the first part agrees to keep an account of said lumber from time to time as the same is being delivered on said property and shall grade and inspect said lumber as it is being moved and keep an account of each grade and kind. *And it is agreed that said account and tally shall not be conclusive upon the party of the second part until the same is verified by the count and inspection by the party of the second part when received at loading point.* Said party of the first part shall furnish to the party of the second part a statement showing the quantity delivered on said premises from time to time and upon presentation to verify said statement and if found correct then the said party of the second part agree to pay to the party of the first part the sum of ($5.00) five dollars per thousand feet on each thousand feet lumber sawed, when properly piled on said leased premises. *In the event said lumber does not hold out when counted and inspected at loading point by the party of the second part or its inspector, the party of the first part agrees to make such*

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deficiency good whether the same is caused by error in the original count or by any cause whatever. The party of the first part agrees that he will, as the agent of the party of the second part, on or about the first day....., 19.. begin to haul, secure cars, ship and forward the said lumber as the party of the second part may direct at the expense of the party of the first part, at the rate of not less than $..... per month, *it being mutually understood* that all lumber being delivered by the party of the first part *shall be allowed to remain piled upon said premises for sixty (60) days if not sooner called for by the said party of the second part.* It is however agreed that the whole quantity of lumber shall be shipped by the first day of ....., 19... *The party of the second part agrees to pay to the party of the first part the balance of the contract price of the said lumber when the same shall have been received by the party of the second part or by its inspector at shipping point, free from all expense to the party of the second part. It is further agreed that if the party of the first part shall fail as the agent of the party of the second part, to draw, ship and forward the lumber, at the time and in the manner above provided, the party of the second part is authorized to procure the same to be done through other agencies and to deduct all the expense of every kind which shall attend such drawing, shipping and forwarding from the balance of the contract price,* the party of the first part shall on demand, pay the party of the second part such excess. It is agreed that this contract cannot be assigned without the consent of both parties.

"In consideration of the prices to be paid for the aforesaid and the other valuable considerations the party of the second part *agrees to loan the party of the first part ($400.00) four hundred dollars* for which said party of the first part agrees to execute his note with interest at six per cent. from date of said loan. *Out of the first money pay-*

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able under this contract by the parties of the second part to the party of the first part, the said party of the second part may retain in their hands at least $9.00 upon each thousand feet of lumber, until the whole $400.00 and interest has been repaid.

"The term 'shipping point' as used in this contract means f. o. b. cars Honaker, Virginia.

"Witness the following signatures and seals." (Italics supplied.)

The leased land provided for in this contract was secured upon a location on the top of Chestnut Ridge and was provided by Morgan, as stipulated in the contract.

Accordingly, Morgan proceeded to and did manufacture a part of the quantity of lumber provided for in said contract and delivered it from time to time on said leased land by piling it thereon on sticks, as specified in the contract, to there remain for a certain time, as also specified in the contract, prior to its being hauled by Morgan to Honaker where the lumber was to be inspected and recounted by appellants, through their inspector, and loaded on board cars for shipment per order of appellants, all as set forth in the contract. As stipulated in the contract, the property in or title to the lumber was to pass to the vendee upon the delivery of it piled on sticks on said leased land, as provided in the contract, and the total purchase price was to be fixed by the subsequent inspection and recount at Honaker.

There was no other lumber of the vendor (Morgan), nor of anyone else, on said leased land, except that placed there by Morgan, as destined for appellant, as the subject of said contract.

Pending these operations, appellants loaned or advanced to Morgan the $400.00 which they obligated themselves to advance by said contract, and also, subsequently and at different times, the additional sums of $200 and $383.65.

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Subsequently, Morgan became involved in financial difficulties and on June 20, 1913, executed a deed of trust or deed of assignment to Shoemaker, trustee, for the benefit of creditors of Morgan. The conveying clause of this deed is the only portion of it pertinent to the issue before us, and such clause, so far as material, is set forth next below. By such deed Morgan conveyed to said trustee:

"All the remainder of the purchase price due to said party of the first part" (Morgan) "from Ellis and Myers Lumber Company" (the appellants) "for timber or lumber sold and delivered to said Ellis and Myers Lumber Company, as is shown by contract of the ..... day of December, 1912, and of record in the clerk's office of the Circuit Court of Russell county, which said amount will be about $2,000.00." (And) "* * * All the lumber in possession of the said party of the first part, being ties and lumber not sold or delivered to anyone, being of the value of $500.00."

The advances or loans aforesaid by appellants to Morgan were made prior to such deed.

At the time such deed was made there was stored or piled on said leased land certain lumber which is in controversy in this cause.

Following such deed the said trustee (Shoemaker) at the outlay of considerable expense, had such lumber hauled from the leased land to Honaker, where it was inspected and recounted by appellants, through their inspector, and it, or so much of it as bore inspection, was thereupon loaded on board cars at Honaker by the trustee and shipped to appellants.

It does not appear that any communication passed between the trustee and appellant, before or while these transactions were taking place, as to the position of the trustee or appellants with respect to such lumber, touching whether the trustee was hauling and loading it on board cars as

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aforesaid and appellants were inspecting, recounting and receiving shipment of it under the contract aforesaid; or informing the trustee that the appellants had made the advances or loans to Morgan; or whether the trustee was claiming that the lumber itself had been conveyed to him by said deed of assignment, and that he was making a new bargain and sale of it to and appellants were receiving it under such bargain and sale from the trustee. Nor was there any communication between the trustee and the inspector of appellants on this subject, the sole connection of the latter with the matter being to inspect and recount the lumber at Honaker, subsequently to several estimates of it by him made from time to time while it was on the leased land.

After the shipment of the lumber from Honaker, however, as aforesaid, it developed that appellants had made the advances or loans aforesaid to Morgan as aforesaid, which appellants insisted they had the right to set off against the purchase price of said lumber. The trustee, on the other hand, then took the position that the property in or title to said lumber did not pass to appellants under said contract until it was hauled to Honaker, inspected and delivered f. o. b. cars as aforesaid; that as this was not done prior to said deed of assignment, the lumber itself passed to the trustee under the provision of that deed which conveyed to the trustee, "* * * all the lumber in possession of the party of the first part, being * * * lumber not sold or delivered to anyone, being of the value of $500.00;" that he had sold and delivered the lumber to appellants who must pay him the whole purchase money therefor without the right to deduct as set off any advances or loans they may have made to Morgan.

The testimony of the trustee in the cause was to the effect that there was no agreement between him and appellants as to the price they should pay for the lumber, but he testi-

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fied that he let them have it at the same prices as were fixed in said contract as those prices were as good as he could have obtained from others.

There was lumber belonging to Morgan (other than that in controversy in this cause) at the time of said deed of assignment which passed to the said trustee under that portion of the clause of conveyance last above quoted and of which the trustee took possession and sold, some to appellants and some to others.

Following said deed of assignment, certain creditors of Morgan, in two actions of assumpsit, had certain garnishee process served upon appellants, and, in their answer filed in such proceedings the appellants used the following language:

"* * * The said partnership bought of the said Morgan certain lumber to be cut and loaded at Honaker, Virginia, upon which the said partnership is not now to the said B. F. Morgan indebted in any sum of money, but which it may become within the next sixty days in a sum of about $200.00, but at this time this affiant is not able to make the said amount more definite; and this affiant is advised that since the making and entering into of the said contract of December 6, 1912, the business and effects of the said B. F. Morgan have gone into the hands of A. D. Shoemaker, receiver, and that at this date the said B. F. Morgan is indebted to the said partnership in the sum of $181.86, and that the said partnership has in its possession a certain amount of lumber, just how much it has not been able to ascertain, worth about $400.00, the costs of the loading of which lumber according to the terms of the said contract is to be paid out of the proceeds of the lumber itself, and not by the said partnership."

This cause is a suit by creditors of Morgan for the ascertainment of the assets conveyed by said deed of assignment; for the settlement of the accounts of said trustee; the ascer-

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tainment of the true amount due and owing from appellants to such trustee; and the subjection of all of same to the satisfaction of the debts of such creditors in accordance with their respective liens and priorities.

Besides the questions above indicated, there was some controversy in the suit as to the amount of lumber received by appellants, being a small discrepancy, however, between their accounts rendered concerning the lumber and those rendered by the trustee.

The cause was referred to a commissioner who, after taking voluminous depositions, made his report in the cause in an alternate way—one statement being based on the alternative that the court should hold that the property in or title to the lumber aforesaid on the leased land *did* pass to the appellants prior to said deed of assignment, in which case the loans or advances aforesaid were allowed appellants by way of set-off, and a small balance of $150.98 was reported due to the trustee from appellants for lumber which was the subject of said contract, and $8.12 for lumber shipped to appellants by said trustee not covered by said contract, making a total of $159.10 due from appellants to said trustee, with interest thereon from October 17, 1913; the other statement being based on the alternative that the court should hold that the property in or title to such lumber *did not* so pass, in which event credit for said loan or advances were denied to appellants and a balance of $1,054.69, with interest from October 17, 1913, was reported due to the trustee from appellants.

The decree complained of adopted the second above mentioned alternative statement of the commissioner, and upon exceptions duly taken and filed to such report and assignments of error such decree is before us for review on appeal.

Hall, Wingfield & Apperson and *Kime & Kime*, for the appellant.

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W. W. Bird, G. B. Johnson and *A. G. Lively*, for the appellees.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The questions raised by the assignments of error will be considered and passed upon in their order as our conclusions are stated below.

1. The contract involved in this cause, when made, was an executory contract of sale of lumber conditionally—the lumber at the time of the contract not being in existence. The subject of the contract, therefore, was not specific at that time, and the conditions specified in the contract being unperformed, the contract with respect to all of its conditions was entirely executory.

Two things only were essential to convert this executory contract into a complete bargain and sale of the lumber, to the extent of passing the property in or title to the lumber to the vendees (the appellants), namely: (1) The lumber becoming specific—*i. e.*, its coming into existence and being segregated and set apart as the subject of the contract, as stipulated therein should occur as conditions precedent to the passing of the property, or title; and, (2) the performance of the other conditions precedent, if any, to the passing of the property or title, as stipulated in the contract.

(a) That the subject thereof must be specific is essential to the validity of every contract of bargain and sale. It inheres in the very nature of the transaction that a bargain and sale cannot be made of chattels not yet identified—the ownership cannot change, the property or title cannot pass, until the particular property which is the subject of the contract becomes ascertained. This is true independently of the intention of the vendor and vendee. So long as the subject of the contract remains undetermined,

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the law will conclusively presume that the contract is executory, and no property or title can pass from vendor to vendee. Benj. on Sales (4 Am. Ed.), section 78, pages 95-6, section 310, page 323. This, however, is the sole element in such a contract which is independent of the intention of the parties.

That is to say, when the subject of the contract is or has become specific, then—

(b) Whether or not the property or title thereto passes becomes wholly a matter of the mutual intention of the parties, vendor and vendee—wholly a matter of contract between them. In such case, neither delivery of the chattel to the vendee, nor the completion of its manufacture, or anything else to be done to it so that it may be ready for such delivery, nor the measurement or testing of it (when it is to be measured or tested in any way), nor anything further to be done to ascertain the quality, or the quantity, or the price; nor the payment of the purchase money, or any part of it; is essential to the passing of the property or title to the vendee, if the contract provides it shall so pass at a stated time and when the chattel is in a condition stated in the contract. The conditions stipulated in the contract as to these matters are the sole conditions precedent to the passing of the property or title, all other conditions precedent being thereby waived; the vendor being bound by the contract to pass and the vendee to accept the property and title thereto when such conditions have been performed or exist—and hence the property or title then passes to the vendee under the term of the contract. Benj. on Sales, *supra*, sec. 309, p. 322, sec. 311, pp. 323-4, sec. 325, p. 333 section 324, p. 338, *et seq.*, p. 368 *et seq.*; *United States* v. *Ansonia Brass, etc., Co.*, 218 U. S. 425, 31 Sup. Ct. 49, 54 L. Ed. 1107.

In the instant case, the lumber which was the subject of the contract, after it came into existence by being sawed,

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was piled on sticks on the leased land on the top of Chestnut Ridge, as provided for in the contract—which was away from the mill and other lumber of the vendor—there being no other lumber, than that which was the subject of the contract, on such leased land; so that there was no confusion or intermingling of such lumber with other lumber; and no question arises in the instant case of the identity of the lumber—as to its being the specific lumber which was the subject of the contract. We are thus relieved from any consideration of whether the lumber was of uniform quality and value, and other nice distinctions to which a sale of goods in mass gives rise, upon the question of ascertainment of whether the subject of the contract is specific. The following cases bear on this subject, which are cited and relied upon for appellees, but which, therefore, have no controlling bearing upon the instant case, viz.: *New England Dressed Meat, etc., Co.* v. *Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516; *Hubler* v. *Gaston*, 9 Or. 66, 42 Am. St. Rep. 794; *Elgee Cotton Cases*, 22 Wall. 120, 22 L. Ed. 863; *Groff* v. *Belche*, 62 Mo. 400.

In the instant case, the lumber in question was segregated, set apart, by delivery on the leased land as aforesaid. This was "in legal phase * * the appropriation of specific goods to the contract. The sole element deficient in a perfect sale * * " (was) "thus supplied. Benj. on Sales, *supra*, sec. 488, p. 441. And this was done, not under subsequent mutual agreement of the parties—which would have been sufficient to convert the prior executory contract into a complete bargain and sale (*Idem.* sec. 488)—but under the very terms of the contract in writing aforesaid. And with respect to the intention of the parties upon the subject of whether the property or title in the lumber should then pass to the vendee, or such passing should be suspended until some other condition or conditions prece-

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dent should be performed or exist, the contract itself provides in express terms as follows: "* * Whereupon the delivery of said lumber shall be deemed complete, and said lumber shall thereupon become and thenceforth remain the property of the second party" (the vendees) "absolutely and unconditionally."

In the language of Benj. on Sales, *supra*, sec. 309, p. 322, we must say: "The agreement is just what the parties intend to make it, if that intention is clearly and unequivocally manifested, *cadit questio.*" And language could scarcely be more unequivocally manifest than that of the contract in the instant case, above quoted, as expressing the mutual intention of the parties thereto that the property in and title to the lumber in question should pass absolutely and unconditionally to the vendees when it was delivered on said leased land as aforesaid. Consequently it did so pass by the terms of the contract, unless there be some other provision or provisions in the contract which negative this conclusion.

(c) It is urged for appellees upon our consideration that the lumber contracted for was to be of various kinds of timber, of various grades, of various sizes, and to be merchantable under the rule of each grading; that, hence, an inspection of the lumber by appellants, to ascertain whether it came up to the contract specifications, or what part of it did so, was essential to the ascertainment of whether the lumber delivered on said leased land was such lumber as was called for by and was the subject of the contract; that the contract provided merely for an inspection and for an account and tally (or counting) by the vendor as the lumber was delivered on the leased land and did not provide for any inspection of the lumber by the vendees before or when it was delivered on the leased land, but only when a subsequent delivery of it should be made to the vendees at Honaker (all of which facts are true);

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that in fact there was no inspection of the lumber by the vendees until this later time (which fact is also true): and, hence it could not be and was not the intention of the parties that the property in and title to the lumber should pass to the vendees until the lumber was identified by inspectors.

(d) It is also alike urged upon our attention that, in view of the facts aforesaid, (which are all unquestionably true), the amount of the purchase price for the lumber could not be ascertained and was not to be ascertained, indeed, or paid, in accordance with the contract, until after the lumber was subsequently inspected, *i. e.*, tested, measured, recounted and accepted by the vendees at Honaker, and subsequently delivered there f. o. b. cars; and that something more remained to be done to the lumber by the vendor after its delivery on the leased land, namely, he was bound by the contract to expend further time and money upon the hauling of the lumber to Honaker, and hence it could not have been and was not the intention of the parties, when the contract is construed as a whole in the light of such facts and circumstances of the case, that the property in or title to the lumber should pass, until these things were all done.

The position of appellees, referred to in paragraph (c) next above, amounts to this: Under the contract, as per its provisions and as acted upon, the vendor may have delivered on the leased land some of the lumber there delivered, which did not comply with the contract specifications as to kind of timber, or grades, or sizes, or merchantable quality. That since by the contract the vendees were to finally accept and pay for only such of the lumber as complied with the contract specifications, the fair and reasonable construction of the whole contract is that title to none of the lumber passed until it was inspected by the vendees at Honaker, and was thereafter loaded on board cars, the

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provision of the contract next above quoted to the contrary notwithstanding. That position loses sight of the consideration that a complete bargain and sale of chattels may be made subject to a condition subsequent that the chattels shall conform to any stipulated specifications. In such case, the title to the chattels passes at the time of the bargain and sale, notwithstanding the fact that the sale is subject to be defeated in whole or in part by the failure of the chattels to fulfil the stipulated specifications, when such fact is subsequently ascertained. The bargain and sale in such case is a conditional one, to be sure; but the condition is a subsequent and not a precedent condition to the passing of the title, and in no way prevents the latter taking place.

With respect to the positions of appellees referred to in paragraph (d), next above, it is deemed sufficient to say that they all concern circumstances which may be important in cases where the contract is not express, or if express, is not plain and unequivocal as to the intention of the parties as to when the property or title shall pass. They are circumstances to which, in such cases, the courts apply certain rules of construction as furnishing tests for determining the intention of the contracting parties, but in such cases only. To such cases only are the famous rules, known as the rules of Lord Ellenborough, which are relied on by the appellants, applicable. Where the contract is express, plain and unequivocal, as aforesaid, as is true of the instant case, such circumstances are immaterial, and such rules of construction are inapplicable, since they do not have to be resorted to in order to ascertain the intention of the parties to the contract. See authorities above cited.

In the instant cases all of the provisions of the contract relied on for appellees as conditions precedent to the passing of the property or title thereto, appear from the contract itself as conditions precedent only to the payment

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in full of the purchase money, and not to the passing of the property or title thereto—a wholly different thing. The only conditions precedent to the passing of the property or title, is expressly provided in the contract, were those and those only which were to serve to segregate and identify the lumber—to appropriate it—as the subject of the contract, as aforesaid.

Hence, we are of opinion that the authorities cited and relied on for appellant, illustrating various applications of Lord Ellenborough's rules of construction, are inapplicable to the instant case. Such authorities, in addition to those next above referred to, are: *Dixon* v. *Myers,* 7 Gratt. (48 Va.) 240; 35 Cyc., p. 292; *Arbuckle* v. *Gates,* 95 Va. 802; *Thomas* v. *Hubbard,* 79 W. Va. 138, 90 S. E. 817; *Hahn* v. *Fredericks,* 30 Mich. 223, 18 Am. Rep. 119; 2 Schouler on Per. Property., sec. 250; 2 Benj. on Sales, sec. 3; *Blackwood* v. *Cutting Packing Co.,* 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, 203; 2 Va. Law Reg. 58; and none of them concerns a contract which expressly provided in plain and unambiguous terms when the property or title in the chattels should pass to the vendee.

We are, therefore, of opinion that there is no merit in the positions taken by appellees above considered and that the assignments of error of appellants with respect thereto are well taken.

We come now to the sole remaining positions taken by appellees in defense of the assignments of error by appellants, which are, in effect, as follows:

2. That the appellants, by their recognition and acquiescence in the deed of assignment and the action of the trustee, Shoemaker, thereunder, in hauling the lumber from said leased land to Honaker, and loading it on board cars there and shipping it to appellants, recognized and acquiesced in the trustee's right to take over such lumber while on the yard on said leased land by his having it

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hauled therefrom; and appellants having inspected such lumber when delivered to them by the trustee at Honaker and received shipment of it from Honaker by the trustee, are estopped to deny that they purchased the lumber from the trustee, and hence that appellants, if they ever had title to the lumber under the contract aforesaid, are estopped from asserting such title, or any right or set-off against the purchase money for such lumber by reason of any advances or loans made by appellants to the original vendor (Morgan) of the lumber under said contract; and that the law, under such circumstances, will imply a contract of purchase by appellants of and a consequent implied promise of appellants to pay the trustee for such lumber.

Now, as appears from the provision of the deed of assignment quoted in the statement of the case above, such deed did not convey the lumber, or any part of it, to said trustee (Shoemaker), but only "all remainder of the purchase price due to * * (the original vendor, Morgan) from * * (appellants) for timber or lumber sold and delivered to * * (appellants) as shown by contract of.....day of December, 1912," (being the contract aforesaid). There was, therefore, nothing in the deed of assignment in conflict with the rights of appellants as owners of the lumber under the contract aforesaid. On the contrary, the deed of assignment expressly recognized such rights. Hence, no estoppel, as against appellants, could grow out of their acquiescence in such deed.

In regard to the acquiescence of appellants in the action of the trustee in delivering the lumber at Honaker, by hauling it from the leased land thereto, thus incurring the expense of such hauling, and the inspection and acceptance by appellants of the lumber at Honaker, and the receiving of the shipments of it from Honaker by the trustee, there was nothing in all of this inconsistent with the provision of said contract. By the deed of assignment the remainder of the

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purchase money for the lumber which would be due from appellants under said contract was conveyed to Shoemaker, the trustee. If the trustee had "failed to draw (haul), ship and forward the lumber" from the leased land to Honaker, then, by the express provisions of the contract, the appellants were "authorized to procure the same to be done through other agencies and to deduct all the expense of every kind which shall attend such drawing, shipping and forwarding from the balance of the contract price * *," in which event the amount the trustee would have realized from the "remainder" of purchase money aforesaid, conveyed to him as aforesaid, would have been to that extent reduced. Therefore, because of the conveyance to him by the deed of assignment, the trustee had the right to do what he did under the provisions of the contract itself, (he being in the shoes of his grantor, the original vendor party to such contract); hence such action was in no respect in violation of or hostile to the contract or to the rights of appellants thereunder. Therefore, the acquiescence of appellants in such action could not operate by estoppel to deprive them of any of their rights under such contract.

The same is true of the answers of the appellants filed in the two actions of assumpsit, quoted in the statement of the case above. Those answers recognized merely the obligation of appellants for whatever balance of indebtedness might be ascertained to be due from them upon a settlement of accounts under said contract. There was nothing in this inconsistent with their claim of title to the lumber itself under such contract or their right to charge their vendor, Morgan, with any advances or loans they may have made to him under such contract or otherwise.

And as to there being an implied contract of purchase by appellants of and a consequent implied promise of appellants to pay the trustee for the lumber, there being an express and an enforceable contract in existence which

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governed the rights of the parties, the law will not imply a contract in contravention thereof. It is only in the absence of an express or of an enforceable contract between parties, that the law (whether at law or in equity) will, from circumstances, imply a contract between them. *Grice* v. *Todd,* 120 Va. 481, 91 S. E. 609, L. R. A. 1917 D, 512.

With respect to the loans or advances of $400 and $200 and $363.85, made by appellants to their vendor (Morgan), it is true that by the contract aforesaid itself, the appellants bound themselves to lend to Morgan only $400 as an advance upon the purchase money for the lumber. But there was nothing in this which forbade the appellants from subsequently also lending Morgan the further sums of $200 and $363.85. And having done so, prior to the deed of assignment made by Morgan, appellants would have had the equitable right to set off such $200 and $363.85, with interest thereon, aforesaid, against Morgan in any settlement of accounts with him thereafter involving the purchase money owing to him by appellants for the lumber; and Morgan having thereafter become insolvent and made the assignment aforesaid to the trustee, Shoemaker, appellants had and have, in a court of equity, the same right of set off against the trustee. *Feazle* v. *Dillard,* 5 Leigh (32 Va.) 31; *Barnes* v. *Barnes,* 106 Va. 519, 56 S. E. 172.

For the reasons above stated, we are, therefore, of opinion that there was error in the decree complained of, and it will be set aside and annulled, and this court proceeding to enter such decree as the court below should have entered, will decree that the appellees recover of the appellants the sum of $159.10, with interest thereon from October 17, 1913, until paid, $150.98 parcel thereof being all the remainder of the purchase price due and owing by appellants to said trustee for the lumber which was the subject of the contract aforesaid of December 6, 1912, and $8.12,

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the residue thereof, being for eleven hundred and sixty feet of cull lumber shipped by said trustee to appellants and received by the latter, which was not the subject of said contract; and that the appellants recover of the appellees their costs in this behalf expended. And the cause will be remanded to the court below for such further proceedings therein as may be necessary or proper, not in conflict with the views expressed in this opinion.

Reversed and remanded.

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Staunton.

GOLLEHON V. GOLLEHON AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. VENDOR AND PURCHASER—*Rights of Purchaser—Notice of Prior Claims—Complete Purchaser.*—One claiming to be a complete purchaser must aver "a valuable consideration and the actual payment thereof," and "must explicitly deny notice." If a subsequent purchaser receive notice of a prior conveyance or incumbrance before *both* of these affirmative acts are accomplished, he must forbear to proceed further until the equity is inquired into, or else he takes subject thereto. Whatever he does after notice is done *mala fide* and cannot avail him. And this is in consonance with justice as well as in strict analogy to equitable principles. It rests upon the reasonable maxim, "*qui prior in tempore, prior est in jure.*"
2. VENDOR AND PURCHASER—*Rights of Purchaser—Notice of Prior Claims—Complete Purchaser.*—A wife suing her husband for divorce filed a supplemental bill making her husband's brother a party and alleging that her husband had conveyed his real estate to his brother with the fraudulent intent of relieving the land from the incumbrances that had been and thereafter might be fixed upon it in the divorce proceedings. The evidence showed that the brother had notice of the original suit for divorce, but did not fix upon him knowledge of or participation in the fraudulent motives and acts of the husband. The evidence showed, however, that the brother was not a *complete purchaser* of the land until after he was impleaded in the supplemental bill, as at that time he still owed a certain amount of the purchase money, and to that extent the permanent alimony allowed by the decree in the divorce suit constituted a charge on the land in his hands.

Appeal from a decree of the Circuit Court of Smyth county, in a suit for divorce and alimony. From the pro-

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visions of the decree exonerating certain land from liability for alimony, attorney's fee and costs, complainant appeals.

Reversed in part.

The opinion states the case.

S. B. Campbell and *J. D. Perkins*, for the appellant.

Jno. P. Buchanan, for the appellees.

WHITTLE, P., delivered the opinion of the court.

This case is as follows: In March, 1915, Amanda Gollehon filed her bill against Ralph L. Gollehon for a divorce from bed and board on the ground of desertion, and for the allowance of suit money and alimony. The parties were married in October, 1910, in Bristol, Tennessee, at which time plaintiff was nineteen years old, and defendant was a soldier in the United States army. One child, a boy two years of age at the institution of the suit, was born of the marriage. The defendant had never lived with the plaintiff long at a time, being ordered from place to place, and had not contributed anything to the support of plaintiff and her child, except on one or two occasions when she visited him at points where he was temporarily stationed. In December, 1914, defendant abandoned and deserted plaintiff in the city of Roanoke, without cause, and she afterwards returned to her home in Smyth county. Defendant visited his relatives in that county, but did not go to see plaintiff, and endeavored to keep her in ignorance of his presence in the vicinity. About that time his father died intestate, leaving a valuable farm of two hundred acres, located in Smyth county, of which defendant inherited and had allotted to him a one-eighth interest. On March 5, 1915, a *lis pendens* was docketed in the divorce

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sult to fix a charge on defendant's land for alimony, suit money and maintenance, and an injunction was awarded restraining him from disposing of the property. The defendant did not answer the bill, nor did he testify in the case; and on March 13, 1915, a decree was made continuing the injunction in force, and allowing $25.00 counsel fee. Thereupon defendant sought an interview with plaintiff and proposed a compromise of the suit. He informed plaintiff that he had imposed upon her; that they had never been married, and that their child was illegitimate. He then suggested that they should be lawfully married and thus remove the stigma of illegitimacy from their child; and promised to live with and maintain them.

Controlled by these considerations, and believing defendant's statements to be true, plaintiff finally consented, and on April 6, 1915, the remarriage ceremony was performed. Defendant, in the meantime, without the knowledge of plaintiff, had been negotiating with his brother, W. C. Gollehon, for the sale of the land; and, on the date of the remarriage, had procured a deed to be prepared by his attorney (of which fact she was ignorant) from defendant and herself, conveying the land to W. C. Gollehon for the consideration of $680. On April 12, 1915, she received a letter from her counsel advising her that he had been informed that she and defendant had adjusted their differences and were living together; and, if such was the fact, upon payment of the $25.00 attorney's fee and costs he would have the suit dismissed. These terms were never complied with; but on the following day plaintiff united with defendant in the execution of the deed to W. C. Gollehon, and two days later defendant again deserted plaintiff and removed to some point in the West. Since that time he has contributed nothing to her support, and has indicated no purpose to return.

Plaintiff then filed a supplemental bill, to which Ralph

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L. Gollehon and W. C. Gollehon were both made parties, in which she set out the matters that had occurred since the original suit was brought. It was further alleged that the proposed compromise and remarriage were parts of a fraudulent scheme, in which both defendants participated, to enable Ralph L. Gollehon to sell and W. C. Gollehon to purchase the land in controversy relieved of plaintiff's marital rights and freed from the incumbrances that had been and thereafter might be fixed upon it in the divorce proceedings. The bill charged that plaintiff had been coerced into executing the deed by the violence and threats of Ralph L. Gollehon that he would take her life if she refused to comply.

On May 25, 1915, the case was heard as to Ralph L. Gollehon, who had been served with process, and plaintiff was decreed a divorce *a mensa et thore* from her husband, and accorded the custody of the child; and defendant was perpetually enjoined from interfering with such custody or with plaintiff in any manner. The court also, in addition to the $25.00 attorney's fee, decreed that defendant pay to plaintiff $650 permanent alimony, together with an additional attorney's fee of $50.00, and the costs of the suit. Afterwards the suit was matured as to W. C. Gollehon, who filed an answer, which he asked might be treated as a cross-bill, in which he alleged that he was a *bona fide* purchaser of the land and "had complied with the terms of the deed," and prayed that his land be discharged from the operation of any supposed lien or cloud on his title.

Plaintiff answered, taking issue on the allegations of the cross-bill; and on December 20, 1916, the court, upon the pleadings and evidence, passed the decree under review establishing the former decree for the sum of $25.00 and costs of suit, as a charge upon the land, and decreeing its sale for the satisfaction of the same unless paid within thirty days. But the decree exonerated the land from

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liability for the other amounts decreed in behalf of plaintiff, as to which the bill was dismissed. To these adverse provisions of the decree this appeal was allowed.

The last clause of the decree presents the chief question for our determination. While the evidence shows that W. C. Gollehon had notice of the original suit for divorce, it does not, we think, fix upon him knowledge of or participation in the fraudulent and vicious motives and acts of Ralph L. Gollehon in procuring the second marriage ceremony and the execution of the deed. The evidence, however, does show that W. C. Gollehon was not a *complete purchaser* of the land until after he was impleaded in the supplemental bill and affected with the notice therein disclosed. At that time he still owed $249.00 of the purchase money, if, indeed, it has ever been paid. To that extent the permanent alimony allowed by the decree of May 25, 1916, constitutes a charge on the land in his hands in addition to the $25.00 and costs of the suit provided for in the decree under review.

The doctrine with respect to a "Complete Purchaser" is discussed by Professor Raleigh C. Minor in his work on Real Property with his usual accuracy and clearness. After stating that one claiming to be a complete purchaser must aver "a valuable consideration and the actual payment thereof," and "must explicitly deny notice," the learned author observes: "If the subsequent purchaser receive notice of the prior conveyance or incumbrance before *both* of these affirmative acts are accomplished, he must forbear to proceed further until the equity is inquired into, or else he takes subject thereto. Whatever he does after notice is done *mala fide* and cannot avail him. And this is in consonance with justice as well as in strict analogy to equitable principles. It rests upon the reasonable maxim, '*qui prior in tempore, prior est in jure.*'" 2 Minor on Real Prop., section 1409, and authorities cited. That is a well settled principle in this jurisdiction.

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Upon these considerations we are of opinion to reverse the decree under review in so far as it holds that the land in controversy is not liable to payment of permanent alimony established in favor of appellant by the decree of May 25, 1915, to the extent of $249.00, with interest thereon from April 26, 1915, the date of the deed, until paid. We are further of opinion that inasmuch as the record shows that the appellee, Ralph L. Gollehon has wilfully deserted or abandoned his wife, the appellant, Amanda Gollehon, for three years, she is now entitled to a decree for a divorce from him from the bonds of matrimony.

The decree of the Circuit Court of Smyth county must, therefore, be reversed in the particulars indicated, and remanded for further proceedings not inconsistent with the views expressed in this opinion.

Reversed in part.

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Staunton.

GREGORY AND OTHERS v. HUBARD, CLERK.

September 19, 1918.

1. MANDAMUS—*Right to Writ—Writ Unnecessary.*—It appeared that petitioners for a mandamus to compel a county clerk to issue them certificates of election as members of a town council had already qualified as members of the council.

   Held: That as the council was the judge of the election, qualification and returns of its members by section 1030, Code of 1904, the object of the petition had been accomplished, and the mandamus will be refused.

2. ELECTIONS—*Commissioners of Election—Presence of all Commissioners—Case at Bar.*—Section 1022 of the Code of 1904 provides that the judge of election and the registrar appointed by the county board "shall also act as commissioners of election." It is not necessary, under section 133 of the Code of 1904, that all of the commissioners of election should be present when the vote is canvassed. It is sufficient if three be present, and in the case at bar three were present, and the tie vote for mayor was broken in the manner prescribed by section 135 of the Code of 1904.

3. ELECTIONS—*Commissioners of Election—Notice of Meeting—Public Meeting.*—No notice of the time and place of a meeting of the commissioners of election to canvass the returns is required, but they must meet in public.

4. ELECTIONS—*Commissioners of Election—Public Place.*—A meeting of election commissioners held in the clerk's office is held in a public place, and it was none the less public because no one was present except the commissioners, the deputy clerk and counsel for the persons elected.

5. ELECTIONS—*Contest—Refusal by Clerk to Issue Certificate of Election.*—In a proceeding by mandamus to compel a county clerk to issue a certificate of election as mayor to the petitioner, there was no allegation that the election was not fairly held, except the statement of the clerk that one person was allowed to register and vote on the day of election (which might be a ground for contesting the election, but not for the clerk to

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refuse a certificate), and his further statement as to his refusal to permit the commissioners to canvass the returns and their subsequent canvass before his deputy while the clerk was sick. *Held:* These were not good reasons for refusing the certificate, and the clerk could not in this manner annul the election.

6. ELECTIONS—*Commissioners of Election—Time of Canvass of Returns.*—The statute (Code 1914, section 133) requiring the commissioners of election to canvass the returns on the second day after the election is only directory as to the time of canvass, and if they let the time elapse without making the canvass, the successful candidate is not thereby deprived of the benefit of the election, as the commissioners could thereafter canvass the returns, and if they failed to do so, could be compelled to make the canvass.

7. ELECTIONS—*Certificates of Election—Mandamus.*—Under section 137 of the Code of 1904, it was the plain duty of the county clerk to immediately make out a certificate of election to petitioner, in the case at bar, as mayor of the town of Dillwyn, and deliver the same to him, and on request of petitioner therefor, the clerk having failed and refused to do so without good cause, the writ of mandamus prayed for by petitioner should be awarded.

Original application for mandamus.

Writ awarded as to one petitioner and refused as to the others.

The opinion states the case.

Moon & Pitts, for the petitioners.

(No appearance for respondent.)

PER CURIAM:

This is an application to compel the county clerk of Buckingham county to issue and deliver to E. D. Gregory a certificate of his election as mayor of the town of Dillwyn, in said county, and to B. H. Barnes and C. T. Apperson, certificates of election as members of the council of said town.

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It appears that Barnes and Apperson have already qualified as members of the council of said town, and as the council is made the judge of the election, qualification and returns of its members by section 1030 of the Code, the object of the petition has been accomplished as to them, and the mandamus, so far as it affects them, will be refused.

As to E. D. Gregory the writ should be awarded. Section 1022 of the Code provides that the judges of election and the registrar appointed by the county board "shall also act as commissioners of election." It is not necessary, under section 133 of the Code, that all of the commissioners of election should be present when the vote is canvassed. It is sufficient if three be present, and in this case three were present, and the tie vote for mayor was broken in the manner prescribed by section 135 of the Code. No notice of the time and place of their meeting was required, but they were to meet in public. The meeting was held in the clerk's office, a public place, and it was none the less public because no one was present except the commissioners, the deputy clerk and counsel for the persons elected. There is no allegation that the election was not fairly held, except the statement of the clerk that one person was allowed to register and vote on the day of election (which might be a ground for contesting the election, but not for the clerk to refuse a certificate), and his further statement as to his refusal to permit the commissioners to canvass the returns and their subsequent canvass before his deputy while the clerk was sick. These were not good reasons for refusing the certificate, and the clerk could not in this manner annul the election. The statute requiring the commissioners of election to canvass the returns on the second day after the election is only directory as to the time of canvass, and if they let the time elapse without making the canvass, the mayor was not thereby deprived

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of the benefit of the election. They could thereafter canvass the returns, and if they failed to do so, could have been compelled to make the canvass. Under section 137 of the Code, it was the plain duty of the clerk to "immediately make out" a certificate of election to the petitioner, E. D. Gregory, as mayor of the town of Dillwyn, and deliver the same to him, on his request therefor; and having failed and refused to do so, although thereto requested, the writ of mandamus prayed for by him should be awarded.

Writ awarded as to one Petitioner and refused as to the others.

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Staunton.

JEWELL RIDGE COAL CORPORATION v. KEEN.

September 19, 1918.

Absent, Burks, J.

1. MASTER AND SERVANT—*Declaration.*—In an action by a servant against his master for personal injuries, where the negligence of the defendant is sufficiently alleged in the declaration, and the general charge of negligence is followed by the averment, "and without any fault on the part of the plaintiff," the declaration is sufficient. The question, whether plaintiff was guilty of any such negligence, whether common law or statutory, as would preclude a recovery was matter not of averment, but of defense.

2. MASTER AND SERVANT—*Mines and Minerals—Acts 1912, section 13, page 427—Case at Bar.*—Acts of 1912, section 13, page 427, provide that it shall be the duty of each miner to properly prop and secure his place so as to make it secure for him to work therein. In the case at bar, as soon as plaintiff was apprised of the fact that a dangerous condition had arisen at his place of work, in obedience to a positive rule of the defendant, he immediately ceased work, vacated the working place and reported the facts to the mine foreman. That official, upon inspection, determined that the situation did not call for the use of props, but that the loose slate and rock should be taken down, and ordered accordingly.

   Held: That section 13 of the mining act did not apply to the case, because the threatened danger was not such as to call for the use of props.

3. FELLOW SERVANTS—*Mine Law—Acts 1912, chapter 178, section 29.*—After plaintiff, a miner, had notified his foreman that his place of work was unsafe, the foreman directed the slate men to take down the loose slate or rock at plaintiff's place of work. Section 29, chapter 178, Acts of 1912, declares, that in discharging the duties required by the act, "the mine foreman, boss or fire boss, and their assistants shall be considered as acting for the mine owner or operator as a vice-principal."

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Held: That the slate men were not fellow servants of the plaintiff.

4. MASTER AND SERVANT—*Mines—Contributory Negligence—Case at Bar.*—In the instant case, plaintiff, a miner, was not guilty of contributory negligence in resuming work upon the promise of the mine foreman that he would have the place made safe, and the assurance of the slate men that the defects had been remedied.

Error to a judgment of the Circuit Court of Tazewell county in an action of trespass on the case. Judgment for plaintiff. Defendant assigns error.

Affirmed.

The opinion states the case.

Graham & Hawthorne, for the plaintiff in error.

Greever, Gillespie & Divine, for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

This action was brought by the defendant in error, W. H. Keen, against the plaintiff in error, the Jewell Ridge Coal Corporation, to recover damages for a personal injury received by him while in the employment of the plaintiff in error, as a miner engaged in mining coal in its mine. There was a verdict in favor of plaintiff, upon which the court entered the judgment under review. Viewed from the standpoint of a demurrer by defendant to plaintiff's evidence, the material facts are as follows:

The room in which plaintiff was injured was about forty feet wide, and the coal rested upon a seam or layer of "rash" or "fire clay" about six inches thick and six feet deep. On the second night prior to the injury, all the coal in the room that had been shot down had been "cleaned up" to the face of the coal, and the cutting machine men went into the room and undercut the coal in the usual manner. On the

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following morning plaintiff put in shots above the cut and shot the coal down and began loading. After a few cars had been loaded, plaintiff's brother, John Keen, who was loading coal in another room, came into plaintiff's room to help him push a loaded car out to be picked up by the motor, and to push an empty car back to be loaded. John Keen, who was an experienced miner, noticed some "loose top" back of the cut from which plaintiff was then loading, to the danger of which he called plaintiff's attention, and "advised him to go out and have it taken down." Accordingly, plaintiff immediately sought the mine foreman and asked him "to go down and see the condition of his place." Upon examination the mine foreman told plaintiff "that he would have the slate in the face of the place, up next to the working place, taken down and made safe that day or evening after work." So that plaintiff, on being advised by his brother of the unsafe condition of the place where he was assigned to work, complied strictly with defendant's rule, which prescribes: "Should a dangerous condition arise" the miner "shall immediately cease work, vacate his working place and report the facts to the mine foreman." The next morning the slate men, acting under orders from the mine foreman, went into plaintiff's room to take down the loose slate or rock—their instructions and duty being "to go into a room or working place, or entry, or any place where the slate had become loose in order to take it down, * * * to take down what we thought was dangerous, and fix the place in working shape." After the slate men had finished their work and gathered up their tools, and indicated to him that the room was ready for him to proceed with his work and had left, plaintiff walked over to the coal where he had shot down the last cut, and put his right foot on the bench over which the cutter had passed, and was leaning forward picking up small pieces of slate from the top of the coal with his hands, when a piece of rock or slate fell

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from the roof immediately behind him (from the same place where the slate men had removed some rock or slate) and struck his left leg above the ankle, inflicting the injury of which he complains.

The opposing theories of the case are dominating and permeate the pleadings and instructions. They are these:

On the part of the plaintiff in error, that under the mine law statute (Acts 1912, sec. 13, p. 427), "It shall be the duty of each miner to properly prop and secure his place in order to make the same secure for him to work therein, and no miner shall work in any working places unless he has props and timbers sufficient to make his place secure." That statute, it was contended, is applicable in the instant case and mandatory. Consequently, that the original and amended declarations, and some of the instructions, were faulty in failing to show a compliance with the statutory requirement, and also failed to take into account the fact that plaintiff and the slate men were fellow servants, and defendant was not responsible for their negligence.

Plaintiff, on the other hand, controverts both propositions, and the court correctly tried the case upon plaintiff's theory. The negligence of the defendant is sufficiently alleged in the declaration, and the general charge of negligence is followed by the averment, "and without any fault on the part of the plaintiff." The question, whether plaintiff was guilty of any such negligence, whether common law or statutory, as would preclude a recovery was matter, not of averment, but of defense. The objection to the declaration fails to distinguish between matter of averment and proof. *Kleff* v. *Va. Ry. & Power Co.*, 120 Va. 347, 91 S. E. 173.

But we are further of opinion that section 13 of the mining act does not apply to the case, because the threatened danger was not of such a character as to call for the use of props. That question was determined by the mine fore-

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man who was charged with cognizance of such matters. As we have seen, as soon as plaintiff was apprised of the fact that a dangerous condition had arisen, in obedience to a positive rule of the defendant, he immediately ceased work, vacated the working place and reported the facts to the mine foreman. That official, upon inspection, determined that the situation did not call for the use of props, but that the loose slate and rock should be taken down, and ordered accordingly.

The second contention, that the slate men were fellow servants of plaintiff is answered by section 29 of the act, which declares, that in discharging the duties required by the act, "the mine foreman, boss or fire boss, and their assistants shall be considered as acting for the mine owner or operator as a vice-principal."

That plaintiff was not guilty of contributory negligence in resuming work upon the promise of the mine foreman that he would have the place made safe, and the assurance of the slate men that the defects had been remedied, is sustained by abundant authority. Labatt on Master and Servant, secs. 300, 440; *Berns* v. *Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; 9 Ency. Dig. Va. & W. Va. Rep. 699; *Wheel Co.* v. *Chalkley*, 98 Va. 62, 34 S. E. 976; *Riverside Mills Co.* v. *Carter*, 113 Va. 346, 74 S. E. 183.

The case, we think, was tried upon correct principles and fairly submitted to the jury on the law, and their verdict having been rendered for plaintiff upon conflicting evidence, the motion to set aside the verdict as contrary to the law and the evidence was rightly overruled.

We find no error in the judgment, and it must be affirmed.

Affirmed.

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Staunton.

KIRK AND OTHERS v. HOGE AND OTHERS

September 19, 1918.

Absent, Burks and Kelly, JJ.

1. WATERS AND WATERCOURSES—*Use of Water for Mill Purposes—Easements—Case at Bar.*—Upon the partition and sale for partition of land on which a mill was situated, whereby the ownership of the mill was severed from the land through which the tail-race and waste-race of the mill flowed, the use of such races alternately in connection with the operation of the mill, by the temporary stopping of the discharge of water along the tail-race while the owners might be making necessary repairs to the mill, and the discharge of such water during such time by an overflow from a point above the mill into the waste-race, were easements (technically known as secondary easements), of an open, visible and permanent character, appurtenant to the ownership of said mill property as the dominant estate; were reasonably necessary to the enjoyment of the ownership of the mill property, and passed, by implication of law, to the grantee of the mill and his successors, as against the grantees of the land through which the races passed, without the use of any descriptive words of grant or reservation in the conveyances; such easements, upon the partition, being by implication of law charged upon the lands lying below the mill and on which such easements were then located, and those lands being thereby made servient to that extent to the mill property as the dominant estate.
2. WATERS AND WATERCOURSES—*Easement—Extent of Easement—Use at Intervals—Case at Bar.*—The accustomed use fixed the right of use of the easements, and such easements were none the less valid because they consisted in the right of the use thereof at intervals of time, and for certain purposes, as for a diversion of water for certain repairing to be done.
2. WATERS AND WATERCOURSES—*Easement—Implied Grant—Implied Reservations.*—The easements in the instant case having been created, upon the severance of the dominant and servient estates, and such severance having been made in a manner

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equivalent to a partition of the land, the conveyances making such partition, under which the appellants and appellees affected derive title, must be treated as if they were simultaneous conveyances, and the established principles governing the acquisition of easements by *implied grant* govern the case. Therefore, no question arises as to whether a *reservation* of an easement will be implied by law in the absence of any express reservation thereof.

4. WATERS AND WATERCOURSES—*Easement—Prescription.*—Owners of a mill at intervals for a period much longer than twenty years were accustomed, when repairing the mill made it necessary, to divert the water flowing along the tail-race to a waste-race. This operation of the mill and races having been under a claim of right and hostile to the rights of the landowners through whose land the races passed, the mill owners, by adverse, uninterrupted (with respect to the accustomed use), notorious and exclusive enjoyment, as against such landowners, acquired prescriptive title to such easement. And this is true also as to the riparian lower owners of land on the natural channel of the creek, from which the water was originally diverted for the use of the mill.

5. WATERS AND WATERCOURSES—*Riparian Rights—Natural and Artificial Watercourses—Use of Water.*—The natural corporeal right of riparian owners to the enjoyment of an uninterrupted flow of water is possessed by riparian owners of land on natural channels of watercourses only. Such right does not exist in the water flowing in an artificial channel. The right, of those owning land bordering upon or through which artificial channels pass, to the use of the water flowing therein, is not a natural right, nor a corporeal right, but an incorporeal right, which can be acquired only by grant, express or implied, or by prescription.

6. WATERS AND WATERCOURSES—*Prescription—Adverse or Hostile—Use of Water—Mill Race.*—Appellees, landowners, whose lands were located on the tail-race of a mill, claimed that they and those under whom they claim and derive title, had, by their long use and enjoyment of the water flowing in such tail-race, acquired title by prescription to the enjoyment of an uninterrupted flow of such water in such race. But there was never any use of the water by the appellees, or those under whom they claim, adverse or hostile to the right of appellants, the mill owners, to divert at intervals for repairs the water from the tail-race to a waste-race. The absence of such adverse or hostile element in the use relied on by such appellees—an element essential to the acquisition of right by prescription—is fatal to the claim of such appellees to a prescriptive right

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to the uninterrupted use of the water in the tail-race as against appellant.

7. WATERS AND WATERCOURSES—*Diversion of Waters—Act of God.*—Where mill owners, in the accustomed operation of the mill, had the right to divert the water flowing through the tail-race of the mill into a waste-race at intervals for repairs, the circumstance that a cave occurred on the channel of the waste-race, in which the water when diverted to the waste-race sank so that it no longer passed on for the use of the lower proprietors, was not due to any act of the mill owners, and, therefore, did not deprive them of their previously acquired rights to divert the water from the tail-race to the waste-race. Such occurrence falls within what is defined in the quaint language of the common law as an "act of God," for which no man can be held responsible.

Appeal from a decree of the Circuit Court of Giles county. Judgment for complainants. Defendants appeal.

Reversed.

The subject of controversy in this cause is the right intended to be exercised by the appellants in connection with their operation of a certain mill property of theirs, of temporarily stopping the discharge of water along a certain tail-race from the mill while making necessary repairs to the mill, and of discharging such water by overflow from a point above the mill into a certain waste-race during the time needed to make such repairs.

The appellees, James Hoge and wife, Mrs. Josephine Snidow and H. W. Snidow own and reside upon lands located upon said tail-race and they are dependent upon the water flowing in such tail-race for its use for domestic purposes and for their live stock, and appellee, H. W. Snidow has a saw mill located on such tail-race constructed to be operated by such water.

The right aforesaid proposed to be exercised by appellants is one which they, and those under whom they claim and have derived title to said mill property, have exercised

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in the past for approximately seventy years next preceding the institution of this suit, in practically the same manner, and continuously, as the owners of the mill property during all this time had occasion to exercise such right in the ordinary and usual operation of such mill. Nor was there any protest or objection made by appellees, or those under whom they claim and derive title, to the said accustomed exercise of said right by appellants and those under whom they claim and derive title, until a few years (some three or possibly five years) before the institution of this suit. At that time a cave, or sink, occurred in the channel of the said waste-race, from natural causes over which neither appellants nor appellees had or have any control, and when the water flowing from the mill was diverted from the tail-race to the waste-race, according to the accustomed operation of the mill as aforesaid, it would sink and disappear in the cave mentioned, and thus appellees would be deprived of its use for their purposes aforesaid. Hence, one of the appellees then protested, as he testified, with the then owner of the mill, against any future diversion of the water to the waste-race. The testimony for appellants denies such protest. However, after the time of such alleged protest, until this suit was instituted, there was no subsequent diversion of the water to the waste-race made for any appreciable length of time, nor did that become necessary in the operation of the mill, and no such diversion occurred or was contemplated by the mill owners, until just prior to the institution of this suit.

Prior to the occurrence of said cave, or sink, in the channel of the waste-race, when the water was diverted from the tail-race to the waste-race in the accustomed manner of operation of the mill, it flowed along the waste-race to a point where it made a junction with the tail-race, and thence along the tail-race; and the lands of the appellees, being situate as they were both on the tail-race and waste-

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race above, or on the tail-race below such junction, were thus served with water at all times. So that, prior to the occurrence of said cave or sink, it was a matter of no concern to appellees whether said accustomed diversion of the water from one race to the other was or was not made in the operation of the mill. After such cave or sink occurred, however, any prolonged diversion of the water from the tail-race became a matter of serious inconvenience to appellees whose lands are located below the said cave or sink in the waste-race.

At the time of the institution of this suit, appellants were about to make certain necessary repairs to said mill, which would necessitate the diversion of said water from the said tail-race to the said waste-race as aforesaid, which the bill alleges would continue for a period of six weeks, and this suit was instituted to enjoin the appellants from diverting such water from said tail-race and alleges that appellants could, at small expense, construct a ditch or flume around their mill and thus return such water back into the channel of the tail-race, just below the mill, while said repairs were in progress. The decree complained of, in substance, perpetually enjoined appellants from in any way diverting said water from said tail-race or from turning it into said waste-race and from doing any acts whatever which will take the water from said tail-race, unless it be returned back into the tail-race just below the mill.

The bill in this cause also alleges that many other citizens and their families in the same neighborhood, other than the plaintiffs—who are the appellees aforesaid—are similarly situated and would suffer irreparable injury from the diversion of water aforesaid from said tail-race; and the proof shows that there are such citizens and families in the town of Pembroke (whose location is indicated on the sketch hereinafter furnished), and others located above such town on the natural channel of the stream of Little

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Stony creek hereinafter more particularly mentioned, who would suffer serious inconvenience by reason of such diversion of such water; such other persons, however, not being parties to this suit.

The tail-race and waste-race, aforesaid, conducting the water from below the mill, as well as the mill race (which is not involved in this suit), conducting the water from above to the mill, are artificial channels. They were all constructed about seventy years before this suit was instituted by the then owner of a large body of land which included both the mill property of appellants and the lands of appellees, James Hoge and wife, and a portion of the land of appellee, Mrs. Josephine Snidow, and perhaps the residue of the land of the last named and the land of the appellee, H. W. Snidow. The uncertainty as to this matter is due to the fact that the record does not disclose whether one Jacob Snidow, the elder, who was the common testator and grantor of appellants and all of appellees, or one Augustus E. Snidow, who was the common testator and grantor of James Hoge and wife and of Mrs. Josephine Snidow as to a portion of her lands (but not of the last named as to the residue of her lands or of H. W. Snidow), first erected said mill, and constructed said artificial channels for their use aforesaid in connection with the operation of said mill. However, as this is immaterial to the result in the decision of the cause, it will be assumed that the said common owner of some of appellants only, namely, Augustus E. Snidow, first erected said mill, constructed said mill-race, tail-race and waste-race and first used them in connection with the operation of said mill. At that time (about seventy years before this suit was instituted), one Jacob Snidow, Jr. owned the land adjacent to and immediately below the said land of Augustus E. Snidow, and through such land of Jacob Snidow, Jr., the lower ends of said tail-race and waste-race were then constructed and first used for the

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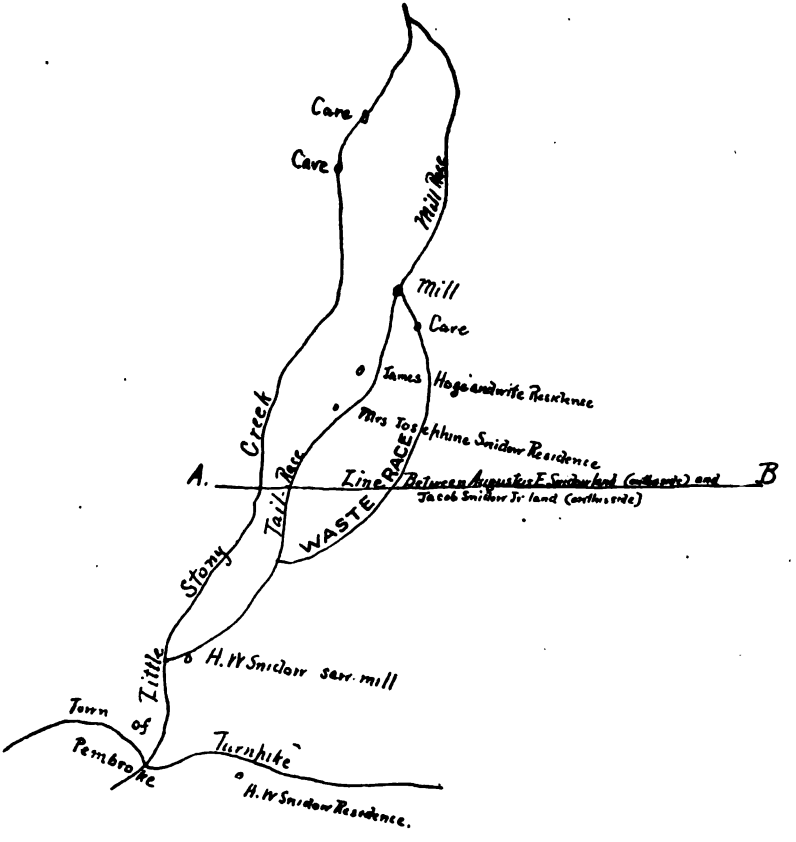
purposes aforesaid. This was done by Augustus E. Snidow, (as we will assume for the purposes of this cause).

The natural channel for said water was a small mountain stream, known as Little Stony creek, which flowed originally through the lands of said Augustus E. Snidow and Jacob Snidow, Jr., as shown in outline on the rough sketch below, which is not intended to be accurate, but suf-



ficiently so to indicate the locations material in this cause. The location of the mill; of the artificial channels of the mill race, tail-race, and waste-race; the residences of the appellees; the saw-mill of the appellee, H. W. Snidow; the divid-

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ing line of the land of Augustus E. Snidow and Jacob Snidow, Jr.; the cave or sink on the waste-race above referred to; and also two caves which occurred on the natural channel of the creek about three years before this suit was instituted; will appear from such sketch.

The mill property, and the tail-race and waste-race extending below the mill for about one-fourth of a mile (to line A-B on the above sketch), are all located on land to which appellants and appellees, James Hoge and wife and Mrs. Josephine Snidow, as to a part of her land, all trace title to said common source, Augustus E. Snidow. The ownership of such land, so far as the mill and races down to said dividing line are concerned, was not severed but remained intact down to the ownership thereof by one John C. Snidow, who died intestate in 188.. (approximately 1885 or 1886, the exact date not shown by the record). Augustus E. Snidow from 1847 and the succeeding owners of such land down to the death of John C. Snidow, say to 1885 or 1886, operated said mill and used the said tail-race and waste-race in connection with the operation of the mill in practically the same manner as they had been and were intended to be used by appellants at the time this suit was instituted as above set forth; and the easements consisting in such use of the lower ends of such tail-race and waste-race, where they extended below upon the land of Jacob Snidow, Jr. (as well as where they extended above, through the said Augustus E. Snidow land), were plainly visible, open, obvious, and continuous, and such use, in the accustomed manner aforesaid was well known during such time (a period of 38 or 39 years), first to Jacob Snidow and subsequently to the appellees, Mrs. Josephine Snidow and H. W. Snidow, owners of portions of the land affected, and was without objection at any time from them or any of them to such use.

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Following the death of said John C. Snidow, in the partition and sale for partition of the lands of his estate, came a severance of the title of the land below the mill, down to said dividing line through which said tail-race and waste-race pass, from the title to the mill property. At the time of such severance, the courses of both of such races were well and plainly defined; their accustomed use aforesaid was plainly visible, open, and obvious, as used as aforesaid, and they were in fact necessary for the said ordinary and long accustomed operation of the mill. The deeds under which both the appellants and appellees claim and derive title to their respective properties, which are portions of such land, were, however, silent as to such or indeed as to any use of said races. By such deeds both appellants and appellees practically derived their titles by partition of the lands of John C. Snidow in 1885 or 1886.

Since their title to the mill property was derived as aforesaid from the estate of John C. Snidow deceased, the appellants and those under whom they claim and derive title have continued the operation of said mill as aforesaid, making use of the said waste-race and tail-race, as aforesaid, as easements appurtenant to such mill property, the same being plainly visible, open and obvious as aforesaid, during all the time, a period of certainly over 24 years, since the title to the mill property was acquired from the estate of John C. Snidow, deceased.

On the other hand those of the appellees who claim title under Jacob Snidow, Jr., and Jacob Snidow, Jr., himself, made use of said water flowing in said tail-race or from the waste-race when the water was diverted thereto as aforesaid, for domestic and other purposes, until the cave occurred therein as aforesaid, for a period many times exceeding the prescriptive period of twenty years; and those of appellees who claim title under the estate of John C. Snidow, and the others under whom they claim and derive

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title, have since the partition and severance of such land aforesaid, made like use of the water flowing in said tail-race and waste-race as aforesaid for more than such prescriptive period.

W. B. Snidow, for the appellants.

Williams & Farrier, for the appellees.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

1. We are of opinion, under well settled rules of law, that upon the partition and sale for partition of the land of John C. Snidow's estate in 188.., and thereafter, the waste-race, as well as the tail-race below the mill now belonging to appellants, and the use of such races alternately in connection with the operation of the mill, by the temporary stopping of the discharge of water along the tail-race while the owners might be making necessary repairs to the mill, and the discharging of such water during such time by an over-flow from a point above the mill into the waste-race (the respective locations of which races are shown on the sketch above), were easements (technically known as secondary easements), of an open, visible and permanent character, appurtenant to the ownership of said mill property as the dominant estate; were reasonably necessary to the enjoyment of the ownership of the mill property, and passed, by implication of law, to those under whom appellants claim and derive title, and thence to appellants, as against those of the appellees who claim and derive title to their lands from the same common source of title, to-wit, from John C. Snidow's estate, without the use of any descriptive words of grant or reservation in the conveyances under which such appellants or appellees claim and derive

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their titles; such easements, upon the partition aforesaid, being by implication of law charged upon the lands lying below the mill and on which such easements were then located, and those lands being thereby made servient to that extent to the said mill property as the dominant estate. Washburn's Easements and Servitude, (3rd ed.) sec. 37, pp. 91-2; *Idem.* p. 95; Angell on Water Courses (4th ed.) sec. 142; *Idem.* sec. 153, pp. 271-2; *Idem.* sec. 155a, p. 272; *Idem.* sec. 153, p. 278; *Idem.* sec. 159; *Idem.* sec. 161, pp. 282-3; *Idem.* sec. 163, p. 285; *Idem.* sec. 166b, pp. 290-1; *Idem.* pp. 292-3; *Idem.* sec. 166f, sec. 166g and sec. 166h; 3 Farnham on Waters and Water Courses, sections 830, 831, 832a, 832b; *Bennett* v. *Booth,* 70 W. Va. 264, 73 S. E. 909, 39 L. R. A. (N. S.) 618; Note in 6 L. R. A. (N. S.) 327; Note in 26 L. R. A. (N. S.) 315.

The accustomed use fixed the right of use of the easements, and such easements were none the less valid because they consisted in the right of the use thereof at intervals of time, and for certain purposes, as for a diversion of water for certain repairing to be done. Angell on Water Courses, *supra,* sec. 143, p. 245, and sec. 153a, *supra;* 1 Minor on Real Prop. sec. 108. The easements in question having been created as aforesaid, upon the severance of the dominant and servient estates aforesaid, and such severance having been made in a manner equivalent to a partition of the land, the conveyances making such partition, under which the appellants and appellees affected derive title as aforesaid, must be treated as if they were simultaneous conveyances, and the established principles governing the acquisition of easements by *implied grant* govern the case. Angell on Water Courses, sec. 161, pp. 282-3; *Idem.* sec. 166h; 3 Farnham on Waters and Water Courses, sec. 830; 1 Minor on Real Prop., secs. 102, 103. Therefore, in the case before us, as to the right of appellants as against such appellees, all deriving title from the partition or sale for par-

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tition of the lands of John C. Snidow's estate as aforesaid, no question arises as to whether a *reservation* of said rights of easement will be implied by law in the absence (as there was) of any express reservation thereof in the conveyances to appellees. We are therefore not called upon to enter here upon any consideration of the distinctions which are drawn by the authorities as to when a reservation of an easement, as appurtenant to real estate retained by a grantor, will be implied in law. See 1 Minor on Real Prop., secs. 105, 106, 107; 3 Farnham on Waters and Water Courses, secs. 832, 832a, 832b; Angell on Water Courses, pp. 292-3, as to implied *reservations* of easements where a grantor conveys away the servient and retains the dominant estate.

2. As to the right of appellants, as against the appellees, H. W. Snidow and Mrs. Josephine Snidow (as to a portion of her land), deriving title from Jacob Snidow, Jr., the easements aforesaid having been under the claim of right and of the character aforesaid and hostile to the rights of such appellees as now claimed by them and against such rights in Jacob Snidow, Jr., under whom they claim and derive title, and enjoyed by appellants and those under whom they claim title from about 1847 until this suit was instituted, by adverse, uninterrupted (with respect to the accustomed use), notorious and exclusive enjoyment, as against such appellees and the said Jacob Snidow, Jr., a period of many times more than twenty years, the appellants long before the institution of this suit acquired prescriptive title to such easements. 1 Minor on Real Prop., sec. 108; Angell on Water Courses, secs. 201, 209, 210, 219c; 3 Farnham on Waters and Water Courses, secs. 809, 822, 827d.

3. As to the rights of appellants as against the citizens of the town of Pembroke and others, riparian lower owners of land on the natural channel of the creek aforesaid (aside

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from the consideration that they are not parties to this suit), it is deemed sufficient to say that the water from the natural channel of such creek having been diverted by those under whom appellants claim title as long ago as about 1847 and such diversion having been continued and the use thereof by appellants and those under whom they claim having been of the character and manner aforesaid, what is said in paragraph next above applies as against the original rights of such citizens also, and they have been long since barred, and the appellants have acquired by prescription the right to continue such diversion of such water.

4. The observations above made apply to such easements as those aforesaid, which are of a permanent character and are necessary for the disposition of water continuously flowing from the dominant estate, so long as the accustomed operation of the mill may be continued in substantially the same way; and where the location of the artificially constructed ways or channels for the flow of the water and the use being made of them are plainly visible, open and obvious. In such case the rule applies, which is above applied, that the easements arise and exist by implication as attached or appurtenant to the dominant estate, and are charged upon the servient estates, without the existence of express words of grant or reservation thereof. A different rule has been applied to easements of a different character and for other drainage, such as for rain water, for sewerage and the like, and where the conduits therefor are concealed from view and their location in any particular direction is not a matter of any peculiar necessity. Angell on Water Courses, secs. 121, 128, 166n, 166t and 166v, relied on by appellees. But, for the reasons above indicated, such a rule has no application to the cause before us.

5. However, appellees claim that (a) as owners of the land located on said tail-race, they have the natural corporeal right to the enjoyment of an uninterrupted flow of

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the water therein; and, if not, that (b) they and those under whom they claim and derive title, have, by their long use and enjoyment of the water flowing in such tail-race, acquired title by prescription to the enjoyment of an uninterrupted flow of such water in such race. These positions will be considered in their order as stated.

(a) The natural corporeal right in question is possessed by riparian owners of land on natural channels of water courses only. Such right does not exist in the water flowing in an artificial channel. The right, of those owning land bordering upon or through which artificial channels pass, to the use of the water flowing therein, is not a natural right, nor a corporeal right, but an incorporeal right, which can be acquired only by grant, express or implied, or by prescription. Angell on Water Courses, sec. 90, p. 91; 3 Farnham on Waters and Water Courses, sec. 820.

There are some expressions in some of the authorities cited and relied on by appellees (40 Cyc. p. 608, (f); 28 Am. & Eng. Ency. Law [1st ed.] p. 982), and in other authorities on the subject, to the effect that rights may be acquired by land owners on artificial channels of water courses of which they cannot be deprived; but upon close consideration of such authorities it will be found that the rights which can be so acquired must be by prescription, or by grant express or implied, and can be acquired in no other way. We venture to say that no well considered authority can be found which holds that such rights are natural rights, such as are possessed by a riparian land owner upon the natural course of a flowing stream, or that they can be acquired otherwise than as aforesaid.

As to appellees, who own parcels of the Augustus E. Snidow, subsequently the John C. Snidow, land; as we have seen above they acquired such lands subject to the easements aforesaid and, in that regard, servient to the said dominant estate of the appellants in said mill property.

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Therefore, the implied contractural relations between the parties thence arising measure and fix the rights of such appellees touching the use of the water in said tail-race. Hence their right to the use of such water has always been, and was at the time of the institution of this suit, subject to the right of the appellants to divert such water into the waste-race whenever the latter had need to do so to make repairs to the mill in accordance with said accustomed use of said easements. And while it is true that such appellees had and have the right to use the water in the tail-race so long as it might or may flow therein as a result of the use of said easements by the owners of the dominant estate, such right of appellees was and is subject to be terminated whensoever and during such period of time as the necessary use aforesaid, appurtenant to the dominant estate, might or may occasion such result (3 Farnham on Waters and Water Courses, secs. 824, 827, 827b, 827c, and other authorities above cited); unless, indeed, such appellees, and those under whom they claim title, have acquired greater rights by prescription, which subject we will now consider.

(b). The use and enjoyment of the water flowing in the tail-race by appellees and those under whom they claim title to lands formerly belonging to Augustus E. Snidow, later to John C. Snidow, as aforesaid, was never in conflict with the use of said easements appurtenant to the dominant estate aforesaid and the attendant right of the owners of the dominant estate to divert the water to the waste-race as aforesaid, nor ever even claimed to be so until some three to five years before the suit, as aforesaid. There was never, therefore, any use of such water by such appellees, or those under whom they claim, adverse or hostile to the rights of appellants aforesaid. The absence of such aderse or hostile element in the use relied on by such appellees—an element essential to the acquisition of right by prescription—is fatal to the claim of such appellees to a prescriptive right

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to the uninterrupted use of the water in the tail-race as against appellant. 3 Farnham on Waters and Water Courses, secs. 827d, 828; Angell on Water Courses, secs. 215a, 219a, and 219c.

As to appellees who own parcels of the Jacob Snidow, Jr., land; as we have seen above, appellants have acquired the prescriptive right to said easements. This has barred the natural rights which such appellees, or those under whom they claim title, may have once had to the uninterrupted flow of the water in the natural channel of the creek, and has vested in the appellants the right to interrupt the flow of the water in the tail-race in accordance with the accustomed use thereof aforesaid, which fixed and determined the extent of appellants' prescriptive right as aforesaid. And such appellees, equally with the other appellees, never had any natural right, as pointed out above, to the use of the water in the tail-race, an artificially constructed channel therefor. They do not claim to have derived the right to the uninterrupted use of the water by grant. As to their claim of prescriptive right to such use, the adverse or hostile element in their use of the water was absent, equally as in the case of the other appellees and, hence, they could not and did not acquire such right by prescription. Therefore, the appellees, who own parcels of the Jacob Snidow land, had not, when this suit was instituted, any right to the uninterrupted flow of the water in said tail-race as against appellants, whether by natural right, by grant, express or implied, or by prescription.

The same observations apply to the citizens of the town of Pembroke and other lower riparian owners aforesaid and to their alleged rights (were they parties to this suit), in so far as such rights appear herein to have once existed.

6. The circumstance that in recent years a cave, or sink, occurred on the channel of the waste-race, after the right of appellants aforesaid had been acquired as aforesaid, in

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which the water when diverted to the waste-race sank so that it no longer passed or will pass on for the use of appellees and others, whose lands are located below, whether on the waste-race, tail-race or the natural channel of the creek, was not due to any act of the appellants in excess of their right to the use of the easements aforesaid. Such occurrence falls within what is defined in the quaint language of the common law as an "act of God," for which no man can be held responsible. That was the misfortune of the appellees and others affected, and not the fault of the appellants; and, hence, the previously acquired rights of the latter should not be thereby taken away.

7. It should perhaps be mentioned in this connection (although it can have no effect upon the rights aforesaid of the parties) that if the water above the mill-race, where it was originally diverted, were turned back into the original natural channel of the creek, it would be lost, except in times of freshet, in the caves, which have in recent years also occurred in that channel above the lands of appellees, and, hence, would not reach them in uninterrupted flow.

8. The appellee, H. W. Snidow, has certain contract rights to the use of water delivered through a certain pipe-log conduit extending from the mill-race above the mill, but as that right is not drawn in question by the pleadings in this cause, nor affected by the decree complained of, no further reference thereto need be made.

For the foregoing reasons we are of opinion that the decree complained of is erroneous and should be reversed, and that the bill and suit of the appellees should be dismissed, which will be accordingly done.

Reversed.

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Staunton.

KISER v. HENSLEY AND OTHERS.

September 19, 1918.

1. BONDS—*Statutory Bonds—Statutory Bond as Common-Law Bond.*—To be good as statutory bonds, bonds must substantially conform to the statutes authorizing their execution. Unless they do so conform, while they may be good as common-law bonds, they are not valid as statutory bonds.
2. FORTHCOMING AND DELIVERY BONDS—*Section 3004, Code of 1904—Failure to Comply with Statute.*—Under section 3004, Code of 1904, a bond payable to the sheriff and not to the creditor, which does not recite the amount due upon the execution, including the fee for taking the bond, commissions and other charges, and conditioned that the claimant shall have property forthcoming and subject to the order of the court, instead of forthcoming at such time and place of sale as may be thereafter lawfully appointed, as required by the statute, is not good as a statutory forthcoming bond.
3. FORTHCOMING AND DELIVERY BONDS—*Failure of Claimant to Institute Statutory Proceedings—Unlawful Possession by Claimant.*—A claimant of property levied on under an execution filed a suspending bond, but failed to institute his interpleader proceedings under the provisions of section 3001 of the Code of 1904 within thirty days from the date of the suspending bond.
   Held: That from the expiration of the period of thirty days, the possession of the property by the claimant was unlawful, and hence at his risk.
4. FORTHCOMING AND DELIVERY BONDS — *Construction — Replevin Bond.*—Inasmuch as the statutory proceeding by interpleader in Virginia is a substitute for the common-law writ of replevin, it is proper to construe a bond given by a claimant of property taken under execution, which, although not valid as a statutory forthcoming bond under section 3004 of the Code of 1904, but good as a common-law bond, as it would have been construed at common law, if it had been a replevin bond, or a redelivery bond, in an action of replevin.
5. BONDS—*Replevin Bond—Measure of Recovery.*—The measure of recovery on a replevin bond, when part of the goods only are returned, is the value of the goods not so returned.

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6. FORTHCOMING AND DELIVERY BONDS—*Measure of Recovery—Invalid Statutory Bond Good as Common-Law Bond.*—In the case at bar, which was a motion on a bond given by a claimant to a sheriff for property levied on under an execution, which bond was not valid as a statutory forthcoming bond under section 3004 of the Code of 1904, but was good as a common-law bond, the measure of recovery, for failure to produce for sale the property levied on, was not the execution debts, principal, interest, costs and commissions, but the value of the property levied upon, and it may be doubted whether, even if the bond had conformed strictly to the statute, the measure would have been different. If the value of the property levied on had exceeded the amount of the execution, the measure of recovery would have been the amount of the execution, interest, costs, etc.

Error to a judgment of the Circuit Court of Russell county, in a proceeding by motion for a judgment for money upon a forthcoming bond.

Affirmed.

The opinion states the case.

T. L. Sutherland, W. W. Bird and *Sutherland & Sutherland,* for the plaintiff in error.

Finney & Wilson and *C. C. Burns,* for the defendants in error.

PRENTIS, J., delivered the opinion of the court.

This case is the sequel to *Fields-Watkins Co.* v. *Hensley,* 117 Va. 661, 86 S. E. 113. It was there decided that where an execution is levied on property in the possession of the execution debtor and the property is claimed by another, it is necessary under the provisions of section 3001 of the Code, not only for the claimant to execute a suspending bond, but also within thirty days after the

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execution of such bond to institute proceedings provided for by statute to settle the title to the property levied on, and that, upon his failure to do so within that period, the property is conclusively presumed to be the property of the party in possession. The interpleader proceeding which was instituted by the claimant of the property levied on in that case not having been instituted within thirty days after the execution of the suspending bond, this court reversed a judgment in his favor and dismissed the proceeding.

This claimant, however, had also given a bond which it is claimed should be construed to be a forthcoming bond under section 3004 of the Code, and the case in judgment is a motion upon that forthcoming bond. The bond is in these words:

"Know all men by these presents, that R. E. Hensley and Albert Breeding, surety, are held and firmly bound unto G. F. Kiser, sheriff of Dickenson county, Virginia, in the sum of one thousand dollars, to the payment whereof well and truly to be made to the said G. F. Kiser, as aforesaid, and we bind ourselves and each of us jointly and severally firmly by these presents. And we hereby waive the benefit of our homestead exemptions as to this obligation, sealed with our seals and dated this the.....day of October, 1913.

"The condition of the above obligation is such, that, whereas, Barker-Jennings Hardware Co. and Fields-Watkins Co. have sued out of the clerk's office of Russell county, Virginia, writs of *fieri facias* against A. E. and J. W. Sprinkle and have placed same in the hands of G. F. Kiser, sheriff as aforesaid; and

"Whereas, said G. F. Kiser, sheriff as aforesaid, by Jeff Long, his deputy, has levied same upon five mules, one horse, two wagons and harness which property is claimed by the above named R. E. Hensley, and the said R E.

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Hensley desired the sale of said property suspended until his claim to same can be litigated; and,

"Whereas, said property was at the time of said levy and is now in the possession of the said R. E. Hensley; and,

"Now, therefore, if the said R. E. Hensley, shall have said property forthcoming and subject to the order of the court, then this obligation is to be void, otherwise to rmain in full force and effect."

It is perfectly well settled that to be good as statutory bonds, such instruments must substantially conform to the statutes authorizing their execution. Unless they do so conform, while they may be good as common law bonds, they are not valid as statutory bonds. *Downman* v. *Chinn*, 2 Wash. (2 Va.) 189; *McClunn* v. *Steel*, 2 Va. Cas. (4 Va.) 256; *Glascock* v. *Dawson*, 1 Munf. (15 Va.) 606; *Martin* v. *Sturm*, 5 Rand. (26 Va.) 696; *Meze* v. *Howver*, 1 Leigh (28 Va.) 443; *Lynchburg, etc., Bank* v. *Elliott*, 94 Va. 700, 27 S. E. 467; *Hall* v. *Wadsworth*, 35 W. Va. 375, 14 S. E. 6.

A comparison of this bond with the statute demonstrates that it cannot be held good as a statutory bond, because—

(a) The statute requires that it shall be payable to the creditor, while this bond is payable to the sheriff;

(b) The statute requires the bond to recite the amount due upon the execution, including the fee for taking the bond, commissions and other lawful charges, if any, while such a recital is entirely omitted from this bond;

(c) The statute requires the bond to have a condition that the property shall be forthcoming at such time and place of sale as may be thereafter lawfully appointed, while the condition of this bond is that the claimant shall have the property forthcoming and subject to the order of the court.

It is clear, then, that the bond is not good as a statutory forthcoming bond.

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After the interpleader proceeding had been dismissed in this court, the sheriff appointed a day and place for the sale of the property levied upon (consisting chiefly of mules and wagons), and the claimant failed to produce a part of the property, some of the animals having in the meantime died. Such as were produced were sold by the sheriff and the execution credited with the proceeds. Then the execution creditors instituted this motion in the name of the sheriff upon the forthcoming bond above referred to, claiming that their measure of recovery was the execution debts, principal, interest, costs and commissions, subject to credit for the property which had been delivered and sold; whereas, the claimant of the property claimed, first, that he was not liable for his failure to produce for sale the animals which had died before the day of sale, and, second, that he was not liable for the execution debt, but only for the value of the property levied on, which he failed to deliver to the sheriff for sale. The trial court overruled his defense based upon the fact that some of the mules had died, because it was not shown that they died within thirty days from the date of the suspending bond, and held that because the claimant had failed to institute his interpleader proceedings within such thirty days, therefore, from the expiration of that period, the possession of the property had been unlawfully held, and hence at his risk. As to this we agree with the trial court.

The court, however, sustained the defense that the claimant was not liable for the balance due on the executions, but was only liable for the value of the property levied upon which he failed to redeliver to the sheriff, and so instructed the jury. There was a verdict and judgment in favor of the plaintiff in error for such value only, instead of for such balance due, and this is the only question which needs consideration.

Inasmuch as the statutory proceeding by interpleader

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in Virginia is a substitute for the common law writ of replevin (Report of Revisors, 1849, pp. 735, 765; *Allen* v. *Hart,* 18 Gratt. [59 Va.] 730; Burks' Pl. & Pr., 215; 4 Min. Inst. [3d ed.], Pt. 1, 430), it is proper to construe this bond as it would have been construed at common law, if it had been a replevin bond, or a redelivery bond, in an action of replevin.

The measure of recovery on a replevin bond, when part of the goods only are returned, is the value of the goods not so returned. *Edwin* v. *Cox,* 61 Ill. App. 567.

"The interest of the sheriff on levy upon property is to the amount of his execution—by virtue of the execution he is entitled to the possession of the property for the purpose of sale and satisfaction. Hence, if the property levied upon be replevied, and be of greater value than the amount of the execution, the rule of damages would be the amount of the execution, interest and costs made upon said suit; if the value of the property be less than the amount of the execution, then the full value of the property." *Jennings* v. *Johnson,* 17 Ohio 154, 49 Am. Dec. 451; *Dodge* v. *Chandler,* 13 Minn. 114 (Gil. 105); *La Crosse, etc., Co.* v. *Robertson,* 13 Minn. 291, (Gil. 269); *Booth* v. *Ableman,* 20 Wis. 21, 88 Am. Dec. 730; *Bleiler* v. *Moore,* 88 Wis. 438, 60 N. W. 792; 34 Cyc. 1568, 1575; *Larabee* v. *Cook,* 8 Kan. App. 776, 61 Pac. 815; *Sands* v. *Fritz,* 84 Pa. 15; *Gingell* v. *Turnbull,* 3 Bingham's N. C. 881. This seems to be the universal rule. 34 Cyc. 1582, and cases cited.

A very recent case is *Trindle* v. *Register, etc., Co.,* 58 Colo. 81, 142 Pac. 282.

So that it seems to us clear that the trial court correctly instructed the jury, and that there is no error in the judgment.

It may be remarked in passing that it may well be doubted whether, even if this bond had conformed strictly to the statute, the result would have been different.

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All of the cases in Virginia, so far as we are advised, referring to forthcoming bonds have been as to forthcoming bonds given by execution debtors or by tenants whose property had been levied on under distress warrants. If the revisors merely intended the statutory proceeding by interpleader under chapter 142 of the Code to be a substitute for the writ of replevin, and thereby to provide a simple and uniform method for trying conflicting claims to personal property, it is difficult to understand why such a burden should rest upon the claimant of property who is endeavoring to protect it from an illegal levy as to require of him just what is required of a debtor under an execution who is already liable and in default and desires by the forthcoming bond to obtain an extension of time in which to pay his debt. If the property so levied upon exceeds in value the principal, interest and costs of execution, then clearly if the claimant fails to redeliver the property when required to do so the measure of damage to the creditor for such default is the amount due on the execution. If, however, the execution debt is large and the value of the property small, it seems an undue hardship to require him to assume the burden of paying the entire debt in case he fails to redeliver property which is of relatively small value. It would seem that the ends of justice would be fully attained, every right protected and the purpose of the statute accomplished if the rule should be that the claimant who gives a forthcoming or redelivery bond, under such circumstances, for property less in value than the amount of the execution debt, should be held only responsible for its value, or for the value of such part thereof as he fails to redeliver. It is noted in this connection that section 3004, under which the claimant of the property is allowed to retain possession of it, provides that the penalty of the forthcoming bond shall be double the value of the prop-

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erty, whereas a forthcoming bond, taken from the execution debtor, is usually double the value of the debt, principal, interest and costs; and it is further observed that when the revisors of 1849 completed the abolition of the writ of replevin as a remedy in Virginia, they included no such provision for a forthcoming bond to be executed by the claimant or any other person. This latter provision did not appear in the Code of 1849, but was first authorized by an act approved May 12, 1852. (Acts 1852, p. 78.) If the true construction of these statutes is not to be as is here intimated, then the obscurity caused by making the statutes which are applicable to forthcoming bonds executed by execution debtors, applicable to forthcoming bonds executed by mere claimants of property having no liability under the execution, should be removed by the legislature.

Affirmed.

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Staunton.

LANDON AND OTHERS v. KWASS AND OTHERS.

September 19, 1918.

Absent, Burks, J.

1. INJUNCTION — *Jurisdiction — Violation of Town Ordinance.*— Equity will not restrain an act merely because it is in violation of a town ordinance; but where the violation of the ordinance results in special and irreparable injury to private property, the owner is entitled to injunctive relief.
2. INJUNCTION—*Irreparable Damage—Fire Limits.*—Increase in fire risk and cost of insurance, caused by the erection, in violation of a town ordinance, of a wooden instead of a brick wall adjoining appellants' building, does not result in such special and irreparable damage to appellants' property as to entitle them to injunctive relief.
3. INJUNCTION—*Violation of Fire Limits Ordinance—Discretion of Council.*—Appellees erected a wooden instead of a brick wall on their premises adjoining the property of appellants. There could be no doubt that the appellees would have had the right to do what they did but for the provisions of a town ordinance. The ordinance itself was fully warranted by the charter of the town, and reserved to the council the discretion to determine whether a building erected in violation thereof should be torn down. Since the appellants are dependent entirely for their standing in court upon the ordinance, it would seem clear that they could not call upon a court of equity to exercise a discretion which that ordinance expressly reserved to the town council; therefore, a court of equity has no jurisdiction to grant a mandatory injunction against such wall.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for defendants. Complainants appeal.

Affirmed.

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The opinion states the case.

Greever, Gillespie & Divine, for the appellants.

Minter & Minter and *E. H. Butts,* for the appellees.

KELLY, J., delivered the opinion of the court.

The town of Pocahontas, under authority conferred by its charter, fixed and prescribed fire limits and passed the following ordinance in regard thereto:

"No person, firm or corporation shall be allowed to erect any building or structure within the fire limits of said town mentioned in the foregoing section of this chapter, except the same may be of brick or stone, and the outside walls of such building shall be as follows: For one story building not less than thirteen inches thick; for a two story building, not less than thirteen inches for the first story and not less than thirteen inches for the second * * * Any person, firm or corporation who shall violate any of the provisions of this section shall be fined not less than ten dollars nor more than thirty dollars for each day of such violation, and in the discretion of the council the said building or structure shall be torn down."

The appellants, Landon and others, owned a two-story frame building, and the appellees, Norman Kwass and Sol Kwass, owned an adjoining two-story brick building. Both buildings were within the fire limits. Owing to the defective condition of the foundation under the adjoining brick wall, it became necessary to remove and reconstruct that wall. Appellees applied to the building committee of the town council for permission to construct the new wall out of wooden material, and the permission was granted over the protest of the appellants. The authority of the building committee to grant such permit is, as we think, successfully

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challenged by the appellants. As soon as the appellees began the erection of the new wall out of wooden material, appellants applied for an injunction, the main prayer of the bill being, "that an injunction be issued, enjoining and restraining the said Norman Kwass and Sol Kwass, and their agents and employees, from erecting said wall of said building out of frame or wooden material, and out of any material other than brick or stone, as provided in the ordinance of said town, and to require the said Norman Kwass and Sol Kwass to remove said wall, or any part thereof which may have been erected out of any material other than brick or stone."

The application was heard in vacation, and an order was entered, the substance of which was as follows: "* * * the judge of said court being of the opinion that complainants are entitled to the injunction prayed for in said bill, it is therefore adjudged, ordered and decreed that the said Sol Kwass and Norman Kwass, and their agents and employees be and they are hereby enjoined and restrained from erecting or building out of wooden or frame material or out of any material other than brick or stone, the north wall of their building upon the lot set out and described in the bill in this case. * * * * And the question as to whether a mandatory injunction should issue is deferred till the hearing of the cause on the merits and on the hearing the court will pass on the question as to whether or not the wall in controversy shall be removed."

After the cause had been duly matured for final hearing, the court entered the decree appealed from, which, so far as material, was as follows: "* * * the court is of the opinion and doth so adjudge, order and decree that the injunction heretofore granted in this cause was properly granted, but that it has been shown by the evidence that the wall in the bill mentioned and the construction of which said injunction enjoined and prohibited has been actually completed; that there is vested in the town council of the

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town of Pocahontas, under the charter of said town, a discretion as to whether or not a wall erected contrary to the provisions of the charter within the fire districts of said town shall be torn down and removed, and as said town council has never exercised its discretion in this instance by ordering said wall to be torn down and removed, it is not proper for this court to grant a mandatory injunction, requiring the defendants to tear down and remove said wall, and therefore such mandatory injunction is refused, that as the injunction heretofore awarded in this cause was at that time properly awarded, the defendants should pay the costs of this suit, and it is therefore further adjudged, ordered and decreed that the complainants recover of the defendants their costs in this behalf expended."

The grounds upon which the jurisdiction in equity is invoked are that the erection of the wall violates the ordinance, and that it causes a special and continuing damage to the adjacent property by reason of the resulting increase in fire risk and cost of insurance.

It is contended by the appellees that the ordinance was not violated because the reconstruction of the wall did not amount to the "erection" of "any structure or building." Without so deciding, we may, for the purposes of this discussion, assume as a fact that this contention is untenable and that the appellees violated the ordinance; and it is expressly proved and not controverted that the substitution of a wooden for a brick wall will increase the danger from fire and the insurance rate. The question, then, is, do these facts entitled the appellants to injunctive relief?

Equity will not restrain an act merely because it is in violation of a town ordinance; but where the violation of the ordinance results in special and irreparable injury to private property, the owner is entitled to injunctive relief. 20 R. C. L., sec. 46, p. 431; *Id.*, sec. 89, p. 474; 22 Cyc. 902; *St. Johns* v. *McFarlan*, 33 Mich. 72, 20 Am. Rep. 671; *Houl-*

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ton v. *Titcomb* 102 Me. 272, 66 Atl. 733, 120 Am. St. Rep. 492, 10 L. R. A. (N. S.) 580; *Bangs* v. *Dworak*, 75 Neb. 714, 106 N. W. 780, 13 Ann. Cas. 202, 5 L. R. A. (N. S.) 493.

It follows, therefore, that if the erection of the wall in question will result in special and irreparable damage to the appellants' property, they are entitled to an injunction; otherwise not. The damage alleged and proved is an increased fire risk and a higher insurance rate. There are authorities holding that such allegation and proof is sufficient to warrant the relief. See, for example, *Kaufman* v. *Stein*, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368; *Bangs* v. *Dworak*, 75 Neb. 714, 106 N. W. 780, 5 L. R. A. (N. S.) 493, 13 Ann. Cas. 202. We are of opinion, however, that the better view is to the contrary.

In *Hagerty* v. *McGovern*, 187 Mass. 479, 73 N. E. 536, it is said: "The wooden wall would be less of a protection in case of fire, and even might be a source of danger in that respect. But the use of land for building is one of the incidents of ownership. The erection upon it of structures which in themselves are not noxious or unusually dangerous is not a use in violation of the private rights of an adjoining owner, even if in some degree the enjoyment of the adjacent land is made less complete or beneficial than if the land were bare. The breach of the ordinance by the defendant is not an invasion of the plaintiff's private right. All the injurious results of the erection of the defendant's building come, not from the violation of the ordinance, but from the use of the land for building. The plaintiff shows no peculiar damage due to the breach of the ordinance, and no right to have private relief because of its violation."

In the case of *Rhodes* v. *Dunbar*, 57 Pa. 274, 98 Am. Dec. 221, the court, in denying an injunction to prevent the reconstruction of a planing mill, and dealing specially with an alleged damage to neighboring property by increased insurance rates, said: "But it is stated very distinctly in Story's

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Equity Jurisprudence, section 325, that mere diminution in the value of property, without irreparable mischief, will not furnish any foundation for equitable relief. * * * That is to say, the mere diminution, irrespective of any direct damage, is not a ground for injunction. On this principle the diminution by reason of increase of insurance, if it really exists, is no ground for the interference sought."

In the case of *Chambers* v. *Cramer*, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545, the court approves the holding of *Rhodes* v. *Dunbar, supra,* to the effect that the increase of the rate of fire insurance upon neighboring property is not a sufficient ground for an injunction to restrain the erection of the structure producing this result.

In 29 Cyc., page 1193, it is said: "But danger from fire is not a sufficient injury to call for an injunction to prevent the erection of a lawful structure, or the carrying on of a lawful business in a proper manner, nor is a structure rendered a nuisance by the mere fact that its presence enhances the rates of insurance on neighboring property." In a note to the text just quoted, it is said: "It is not a ground for equitable relief against the erection of a proposed building that such building will increase the rates of insurance on neighboring buildings. *Siskiyou Lumber, etc., Co.* v. *Rostel,* 121 Cal. 511, 53 Pac. 1118; *Gallagher* v. *Flury,* 99 Md. 181, 57 Atl. 672; *Rhodes* v. *Dunbar,* 57 Pa. 274, 98 Am. Dec. 221. *Contra, Kaufman* v. *Stein,* 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368." See also, *Benton* v. *Elizabeth,* 61 N. J. Law, 411, 39 Atl. 683, 906, and 61 N. J. Law, 693, 40 Atl. 1132.

In the light of the forgoing authorities, it would seem especially clear that no injunction ought to issue in the instant case. There can be no doubt that the appellees would have had the right to do what they have done but for the provisions of the town ordinance. The act was unlawful only because of those provisions. The ordinance itself, which was fully warranted by the charter of the town, re-

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serves to the council the discretion to determine whether a building erected in violation thereof shall be torn down. Since the appellants are dependent entirely for their standing in court upon the ordinance, it would seem clear that they cannot call upon a court of equity to exercise a discretion which that ordinance expressly reserved to the town council.

We find no error to the prejudice of the appellants in the decree complained of, and the same is affirmed.

Affirmed.

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Syllabus.

Staunton.

POSEY AND ANOTHER v. COMMONWEALTH.

September 19, 1918.

1. TAXATION—*Inheritance Tax—Power of State.*—The power of the State to impose inheritance taxes is unlimited.
2. STATUTES—*Construction—Intent of Legislature—Statutes Construed as a Whole.*—It is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense. If the intention of the legislature can be thus discovered, it is not permissible to add to or subtract from the words used in the statute.
3. TAXATION—*Inheritance Tax—Rates.*—By the act taxing inheritance (Acts 1916, chapter 484, page 812), it is manifest that the legislature intended to divide the persons who were to pay the taxes into two classes, and to fix the taxes they were to pay at two separate rates. One class was to pay no tax at all unless the estate exceeded fifteen thousand dollars, and the other was to pay on the whole estate, large or small. One was to pay at the rate of one *per centum*, the other at five *per centum*. After designating these two separate rates, the statute then declares, "The foregoing rates are for convenience termed primary rates,' and the sliding scale of rates fixed by the statute is applicable to both classes.
4. TAXATION—*Inheritance Tax—Rates—Case at Bar.*—In the case at bar, plaintiffs in error were nieces and sole heirs of the decedent, from whom they inherited real estate in this State of the appraised value of $378,050. This inheritance was assessed with collateral inheritance taxes to the State to the amount of $41,707.50, which amount was arrived at by assessing the first $50,000 at the rate of five *per cent.*, the next $200,000 at the rate of ten *per cent.*, and the remaining $128,050 at fifteen *per cent.* This assessment was made under Acts 1916, chapter 484, page 812. The plaintiffs in error claimed that, under the act aforesaid, the assessment should have been at the flat rate of five *per cent.* on the whole $378,050.

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Held: That there was no error in the assessment.

5. STATUTES—*Construction—Rules of Construction not Resorted to where Meaning is Clear.*—Where the meaning of the words used in an act of Assembly is clear, the courts have no power but to declare it, and leave the question of policy to the legislature where it properly belongs.

Error to a judgment of the Corporation Court of City of Roanoke, on a motion to correct an erroneous assessment. Judgment for Commonwealth. Plaintiffs assign error.

Affirmed.

The opinion states the case.

Hart & Hart, for the plaintiffs in error.

Jno. R. Saunders, Attorney-General, J. D. Hank, Jr., Assistant Attorney-General, and *J. Vaughan Gary,* for the Commonwealth.

BURKS, J., delivered the opinion of the court.

The plaintiffs in error are the nieces, and, as such, sole heirs of A. M. Fuller, from whom they inherited real estate in this State of the appraised value of $378,050. This inheritance was assessed with collateral inheritance taxes to the State to the amount of $41,707.50, which amount was arrived at by assessing the first $50,000 at the rate of five *per cent.*, the next $200,000 at the rate of ten *per cent.*, and the remaining $128,050 at fifteen *per cent.* This assessment was made under Acts 1916, chapter 484, page 812. The plaintiffs in error claimed that, under the act aforesaid, the assessment should have been at the flat rate of five *per cent.* on the whole $378,050, and made a motion before the Corporation Court of the city of Roanoke to correct the assessment so as to make it conform to their interpretation of the statute, but the corporation court refused to change the

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assessment, and to its judgment of refusal this writ of error was awarded.

It is well settled that the power of the State to impose such taxes is unlimited. *Eyre* v. *Jacobs*, 14 Gratt. (55 Va.) 422, 73 Am. Dec. 367. Otis & Gleason on Inheritance Taxation, page 3. This is not questioned, but it is insisted that the corporation court erred in its construction of the language of the statute under which the tax is imposed.

It is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense. If the intention of the legislature can be thus discovered, it is not permissible to add to or subtract from the words used in the statute. *Tyson* v. *Scott*, 116 Va. 243, 81 S. E. 57; *Funkhouser* v. *Spahr*, 102 Va. 306, 46 S. E. 378; *Sherwood* v. *Atlantic & D. R. Co.*, 94 Va. 291, 301, 26 S. E. 943; *Hoover* v. *Saunders*, 104 Va. 783, 52 S. E. 657; *Fox* v. *Commonwealth*, 16 Gratt. (57 Va.) 1; *Postal Tel. Co.* v. *Norfolk & W. R. Co.*, 88 Va. 920, 925, 14 S. E. 803.

The statute under consideration, so far as the same need be quoted, is as follows:

"* * * Where any estate in the Commonwealth of any decedent shall pass under a will or under the laws regulating descents and distributions, to any person, or to or for the use of any person, the estate so passing shall be subject to a tax at the rate of five per centum on every hundred dollars' value thereof; provided, that estates passing to or for the use of the grandfather, grandmother, father, mother, husband, wife, brother, sister or lineal descendant of such decedent shall be subject to a tax or one per centum on every hundred dollars' value thereof in excess of fifteen thousand

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dollars. The foregoing rates are for convenience termed the primary rates. When the amount of the market value of such property or interest exceeds fifteen thousand dollars, the rate of tax upon such excess shall be as follows:

"(1) Upon all in excess of fifteen thousand dollars up to fifty thousand dollars, at the primary rates.

"(2) Upon all in excess of fifty thousand dollars and up to two hundred and fifty thousand dollars, two times the primary rates.

"(3) Upon all in excess of two hundred and fifty thousand dollars and up to one million dollars, three times the primary rates.

"(4) Upon all in excess of one million dollars, four times the primary rates."

The first part of the section fixes two rates of taxation. One of five per centum on the hundred dollars which is applicable "to any person," natural or artificial, and which may be termed the general rate. This rate is applicable to all persons, natural or artificial, who are not placed in some other class. The other rate is "one per centum on every hundred dollars' value thereof in excess of fifteen thousand dollars," which is applicable to the persons enumerated in the section, and is usually spoken of as the direct inheritance tax. It is manifest that the legislature intended to divide the persons who were to pay the taxes into two classes, and to fix the taxes they were to pay at two separate rates. One class was to pay no tax at all unless the estate exceeded fifteen thousand dollars, and the other was to pay on the whole estate, large or small. One was to pay at the rate of one *per centum*, the other at five *per centum*. After designating these two separate rates, the statute then declares, "The foregoing rates are for convenience termed primary rates." It will be observed that the statute uses the plural number "rates," not "rate," and this runs through all the subsequent paragraphs of the section. The use of the word

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"rates" therefore, in the paragraph (1) of the section, could not have been an "inadvertence of the draftsman," as contended by counsel for the plaintiffs in error. The plaintiffs in error plainly belong to the class which is required to pay on the whole amount of the inheritance, and the primary rate of tax on that class is fixed by the statute at five *per centum* of the value of such inheritance. It seems equally plain that the sliding scale of rates fixed by the statute is as applicable to this class as to the other class in which the primary rate is only one *per cent.* on the amount in excess of fifteen thousand dollars. The fact that collateral inheritances had been taxed for many years prior to 1916 at a flat rate of five *per cent.* and that no tax had been imposed on direct inheritances is no evidence that the sole purpose of the act of 1916 was to impose a tax on direct inheritance, and that the sliding scale of rates was only applicable to such inheritance. It is reasonable to suppose that when the legislature for the first time imposed a tax on direct inheritance, it would also increase the rate on collateral inheritance, and this supposition is well warranted by the language of the act under consideration.

It is said that the tax imposed, under this construction of the statute, "is burdensome, grievous and so excessive as to be contrary to the policy of taxation as followed in this State." This argument might be of force if the language of the act were of doubtful meaning, but we have had no difficulty in arriving at a proper construction of the act, and where the meaning of the words used in an act of assembly is clear, the courts have no power but to declare it, and leave the question of policy to the legislature where it properly belongs.

There is no error in the judgment of the corporation court, and it is, therefore, affirmed.

Affirmed.

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Syllabus.

Staunton.

RINEHART & DENNIS COMPANY, INC., v. MCARTHUR.

September 19, 1918.

1. MANDAMUS—*Purpose of the Writ—Collection of Debts.*—The writ of mandamus is an extraordinary legal remedy designed to meet emergencies and prevent a failure of justice, and is not designed as a remedy to enforce the collection of debts.
2. MANDAMUS—*Contractural Obligation—Collection from Public Officers.*—Mandamus cannot be used to enforce mere contractural obligations between private persons, nor, as a general rule, can it be used to enforce the collection of a mere money demand from a public officer if the creditor has a full, adequate and complete remedy by an ordinary action at law.
3. MANDAMUS—*Remedy at Law—Adequate and Complete.*—The question in mandamus proceedings is not whether the applicant has a remedy at law, but is that remedy adequate and complete. The other remedy is not adequate where it involves tedious and expensive litigation, or suits against third persons, or is obsolete and inoperative, or does not afford relief upon the very subject matter of litigation. It is not complete where it leaves unperformed the very act the performance of which is sought by the writ. There are also other instances where the remedy at law is not adequate and complete. But where an ordinary action at law will afford the applicant full, adequate, complete and speedy relief, mandamus as a general rule does not lie.
4. MANDAMUS—*Public Officers—Action on Official Bond.*—In a number of instances mandamus against public officers to enforce the payment of funds in their hands has been refused because the party applying for the writ had not exhausted his remedy on the officer's official bond. But the mere fact that a party has a remedy by an action on the official bond of an officer, however, will not alone bar relief by mandamus. Such a remedy may be far from adequate and complete.
5. PUBLIC OFFICERS—*Refusal to Pay Over Money on Order of Court—Contempt.*—Where money is in the hands of an officer of the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as

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directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer.

6. FINAL JUDGMENTS AND DECREES—*Order Directing Payment of Money.*—A decree which disposed of the whole subject of litigation, including the costs, and directed the clerk to pay over to the defendant, or to whom he should direct, money deposited by the defendant to abide the decree, and struck the case from the docket, is a final decree.

7. CONTEMPT—*Enforcement of Decree—Final Decree.*—The fact that a decree is final does not render the court powerless to enforce it by contempt proceedings, and such proceedings would not be a procedure *in the cause*, which was ended, but a procedure *beyond* the cause for the enforcement of the decree.

8. MANDAMUS—*Officer of Court—Jurisdiction.*—In the case at bar, a decree directed the clerk of the court to pay over to defendant in error a certain sum deposited by defendant in error with the clerk to abide the decree. This the clerk refused to do because the same was claimed by the plaintiff in error under an alleged equitable assignment. Thereupon defendant in error applied for a writ of mandamus against the clerk to compel the payment, and the writ was awarded him. Although mandamus did not afford, and could not have afforded any greater relief than the petitioner could have obtained by applying for contempt proceedings, yet as the trial court had jurisdiction by mandamus to compel its officer to do a merely ministerial act, concerning which he had no discretion, the proceeding by mandamus was not *per se* either void or voidable, and as no objection was raised to it in the trial court, by demurrer or otherwise, its award is not assignable error on appeal.

9. APPEAL AND ERROR—*Petition for Appeal—Mandamus.*—Objection cannot be made in the appellate court to the awarding of a mandamus where not mentioned in the petition for the writ of error.

10. MANDAMUS—*Objections Ex Mero Motu.*—Where the trial court has jurisdiction of the subject matter, objection to a mandamus, if available, cannot be noticed by the court *ex mero motu.*

11. APPEAL AND ERROR—*Harmless Error—Irregularities in Favor of Party Prevailing.*—Where the decision on the merits is in favor of the defendant in error, he cannot assign irregularities in the proceedings as error.

12. APPEAL AND ERROR—*Harmless Error—Irregularities.*—The Supreme Court of Appeals does not sit to correct all irregularities that may occur on the trial of a cause, but only such errors and irregularities as are prejudicial to the substantial rights of the party assigning them.

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13. MANDAMUS—*Answer—Interpleader.*—In the instant case, defendant in error filed his petition for a mandamus against the clerk of court to compel payment by the clerk to him of a sum of money in the hands of the clerk. The clerk answered, disclaiming any interest in the fund, and offering to bring the money into court for its disposition, but alleging that the fund was claimed by the plaintiff in error as assignee of the defendant in error, and asking that his "answer may be treated as an interpleader." On exception to this answer, the court refused to accept it as an answer to the petition, but accepted it as a statutory interpleader under section 2998, Code of 1904, and allowed the plaintiff in error to come in by petition and assert its claim to the fund. Even if it be conceded that section 2998, Code of 1904, applies to a petition for a mandamus, the answer of the clerk did not comply with the requirements of that section, and the circuit court erred in directing it "to be treated as an interpleader." There was no reason, however, why the answer should not have been treated as an answer to the petition for the mandamus.

14. MANDAMUS—*Answers—Defenses.*—In mandamus proceedings, under sections 3011-3021, Code of 1904, it would seem that any defense may be made which shows that the petitioner is not entitled to the writ prayed for. If, as in the instant case, the defendant is the mere custodian of a fund, in which he claims no interest, but which is in good faith claimed by another, there is no good reason, under the liberal provisions of the new procedure, why the claimant should not be admitted as a party, and the rights of the parties thus speedily determined in the mandamus proceeding.

15. APPEAL AND ERROR—*Weight Attached to Decision of Trial Court.*—Where no controverted fact was passed on by the trial court, but solely a question of law, the judgment of the trial court is not entitled to the same weight as where given upon conflicting evidence upon a question of fact.

16. ASSIGNMENTS—*Orders—Consideration—Security for Existing Debt—Acceptance.*—An order upon a fund deposited with a clerk of court to abide the future decree of the court, given as security, in part, for an existing debt, is founded upon a valuable consideration, and it is immaterial that the beneficiary did not know of the order when it was given. The subsequent acceptance of it related back to the time it was given.

17. ORDERS—*Assignments—Revocation—Case at Bar.*—M., by his counsel, deposited a fund with a clerk of court to abide the event of a suit pending. Thereafter, M. gave an order in writing to his counsel to pay over the fund when "of not further service in" the suit pending to the R. & D. Co. Counsel

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for M. was also counsel for the R. & D. Co. The order was supported by a valuable consideration and M. intended by it to transfer the fund to R. & D. Co.

Held: That this constituted a valid equitable assignment of fund, which was irrevocable by M.

18. ASSIGNMENTS—*Form.*—Equity looks at the substance of a transaction, and not its mere form. No particular form of words is necessary to constitute a valid assignment in equity of a chose in action. The intention of the assignor is the controlling consideration. If the owner of a chose in action, for a valuable consideration, signs and delivers a writing whereby he intends to part with his ownership, whether it be to the use of the assignee or of a third person, or to apply the proceeds to a specific purpose other than for the use and benefit of the assignor, it is a valid equitable assignment, regardless of the particular language used. It is sufficient if the debtor would be protected in making payment thereon.

19. ASSIGNMENTS—*Acceptance—Presumption.*—An assignment as security for an existing debt is founded on a valuable consideration, and its acceptance will be presumed until the contrary appears.

20. RES JUDICATA—*Matters not in Issue.*—Where the record in a case presented no controversy between the assignor and assignee over the fund in dispute deposited with the clerk of the court, the decree in the case directing the clerk to pay the money deposited to the assignor does not render the matter in controversy *res judicata.*

Error to a judgment of the Circuit Court of Dickenson county, awarding a mandamus.

Reversed.

The opinion states the case.

McNutt & Walker and *Roland E. Chase*, for the plaintiff in error.

Sutherland & Sutherland, for the defendant in error.

BURKS, J., delivered the opinion of the court.

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Acting under a decree in the chancery suit of *Bucyrus Company* v. *McArthur and others*, M. T. McArthur one of the defendants therein, deposited with the clerk of the court $1,200, to be held by him to abide the future decree of the court. The parties to the litigation settled their differences and a decree was entered therein directing the clerk to pay the said $1,200 to McArthur, or to whom he might direct, and the case was stricken from the docket. McArthur then demanded the money of the clerk, but he refused to pay it, because it was claimed by the plaintiff in error under an alleged equitable assignment from McArthur. Thereupon McArthur applied to the judge of the Circuit Court of Dickenson county for a writ of mandamus against the clerk to compel the payment and delivery of the money. Upon a hearing on the merits, the judge awarded the writ, and to that judgment this writ of error was awarded.

The writ of mandamus is an extraordinary legal remedy designed to meet emergencies and prevent a failure of justice, and is not designed as a remedy to enforce the collection of debts. Merrill Man., section 67; High Ex. Rem., section 341. It cannot be used to enforce mere contractural obligations between private persons, nor, as a general rule, can it be used to enforce the collection of a mere money demand from a public officer if the creditor has a full, adequate and complete remedy by an ordinary action at law. The question is not whether he has a remedy at law, but is that remedy adequate and complete. The other remedy is not adequate where it involves tedious and expensive litigation, or suits against third persons, or is obsolete and inoperative, or does not afford relief upon the very subject matter of litigation. It is not complete where it leaves unperformed the very act the performance of which is sought by the writ. There are also other instances where the remedy at law is not adequate and complete. But where an

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ordinary action at law will afford the creditor full, adequate, complete and speedy relief, mandamus as a general rule does not lie. *Sinclair* v. *Young*, 100 Va. 284, 40 S. E. 907; *Richmond Ry. Co.* v. *Brown*, 97 Va. 26, 32 S. E. 775; *Nottoway County* v. *Powell*, 95 Va. 635, 29 S. E. 682; *Lewis* v. *Whittle*, 77 Va. 415; *Page* v. *Clopton*, 30 Gratt. (71 Va.) 415, and cases cited; 26 Cyc. 168-172; 19 Am. & Eng. Encl. Law (2d ed.) 748-50; 2 Spelling Ex. Relief, secs. 1375, 1379.

In *Arrington* v. *Van Houton*, 44 Ala. 284, a county treasurer having funds in hand, refused to pay, on demand, a claim which had been duly allowed and filed, and it was held that mandamus would not lie as the creditor had a sufficient remedy by action on the treasurer's bond. For a like reason, mandamus was refused in *Speed* v. *Cocke*, 57 Ala. 209, where a county treasurer had, contrary to law, disregarded the order of registration of a claim and paid claims subsequently registered. In *Adair* v. *Hancock Deposit Bank*, 107 Ky. 212, 53 S. W. 295, a sheriff failed to pay over the county levy as directed, but mandamus was refused because the party should have exhausted his remedy on the sheriff's official bond. In *Evans* v. *Thomas*, 32 Kan. 469, 4 Pac. 833, it was said: "Writs of mandamus are not allowed to parties in any case as a mere matter of course. They are allowed only when parties have rights to enforce, and then only when they have no other plain and adequate remedy in the ordinary course of the law, and only when justice would be likely to be defeated or frustrated unless the writ of mandamus be allowed." See also *State* v. *Kansas City*, 38 Kan. 593, 17 Pac. 185. It is true that the Kansas cases cited were merely declaratory of the existing law that the "writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." This same statute was adopted in Oklahoma, and that State has followed the Kansas cases. In *Steward* v. *Territory*, 4 Okla. 707, 46 Pac. 487, a probate judge had collected money by

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virtue of his office, and it was held that mandamus would not lie to compel the payment of the money into the county treasury as an ordinary action on the bond of the judge furnished an adequate and complete remedy.

The mere fact that a party has a remedy by an action on the official bond of an officer, however, will not alone bar relief by mandamus. High Ex. Rem., sec. 35; 26 Cyc. 172. Such a remedy may be far from adequate and complete. For example, the refusal of a clerk to issue process, would give rise to an action for damages on his official bond, but as the relief is not adequate and complete, mandamus lies. *People* v. *Loucks*, 28 Cal. 69. So the refusal of an officer to issue a warrant to a creditor, after direction by superiors, may be enforced by mandamus although the creditor had a right of action on the officer's official bond. *Amer. Bridge Co.* v. *Wheeler*, 35 Wash. 40, 76 Pac. 534. Many other cases will suggest themselves.

In 26 Cyc. 172, it is said: "But in case of corporations and ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law by mandamus, even though the party has another remedy by action for neglect of duty." An examination of the cases cited, so far as available, shows that this statement does not apply where the function to be exercised consists in the mere payment of money for which a full, adequate, complete and speedy remedy is afforded by an ordinary action at law, but is applicable to the doing of some collateral thing. *People* v. *Loucks, supra; Cumberland, etc., Tel. Co.* v. *Morgan's, etc., R. Co.*, 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442. See also note 34 Am. St. Rep. 317. Again, cases may arise where an action on the officer's bond would be a wholly inadequate remedy, as where a successor in office could not properly administer the functions of his office unless the money which belonged to the office was surrendered to the successor together with

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everything else pertaining to the office. *Steward* v. *Territory, supra.*

In *Kidd* v. *Va. Deposit Co.*, 113 Va. 612, 75 S. E. 145, it was held that "imprisonment for debt passed away in this State with the abolition of the *capias ad satisfaciendum* in 1849, and, in a proceeding for contempt, where the contempt is not established, it is error to seek to enforce the return of money improperly paid, by an order directing the imprisonment of the defendant if the money be not paid." It will be observed that, in that case, the contempt was not established. It may be assumed for the purposes of this case that, in this State, a personal decree merely for the payment of money, in a suit by one private person against another, cannot be enforced by imprisonment, in the absence of any question of contempt. But where money is in the hands of an officer of the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer. 9 Cyc. 10 and cases cited. Clearly, then, the order of the chancery cause directing the clerk to pay over the money to the defendant in error could have been enforced by contempt proceedings, unless there is something in the suggestion that the decree was a final decree in that cause.

There can be no question that the decree in the *Bucyrus Case* was a final decree. It disposed of the whole subject of litigation, including the costs, directed the clerk to pay the money in controversy to McArthur, or to whom he should direct, and struck the case from the docket. *Rawlings* v. *Rawlings*, 75 Va. 76. But the fact that the decree was final did not render the court powerless to enforce it by contempt proceedings. Had the fact that the clerk refused to pay the money been reported to the court, it could, and doubtless would, have proceeded against him for contempt. Such

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a procedure would not have been a procedure in the cause, which was ended, but a procedure *beyond* the cause for the enforcement of the decree. *Cocke* v. *Gilpin,* 1 Rob. 20, 28. As said by Judge Brooks, in the last mentioned case, "All decree must be enforced by attachment when any party is in contempt of the court, and this necessity is most frequent in cases of final decrees." Even in criminal cases, an order may be entered for the enforcement of the judgment, though the judgment be final and the penalty death. In *Nicholas* v. *Commonwealth,* 91 Va. 813, 815, 22 S. E. 507, 508, it is said, "there would be a strange lack of vitality in a court if it could not cause to be enforced by execution a valid and live judgment which it had rendered." No mandamus, therefore, was necessary to secure the enforcement of the decree.

The futility of the proceeding by mandamus is demonstrated by a comparison of the decree entered in the chancery cause with the order made in the mandamus proceeding. The decree directed "that the money deposited by the said M. T. McArthur with the clerk of this court may be released, and the clerk is directed to pay the same immediately to the said M. T. McArthur, or to whomsoever he may direct the same to be paid." By the judgment, "it is ordered that F. B. Chase, clerk, be and he is hereby directed and enjoined, immediately after the receipt of this order, or service of a copy of the same on him, to pay the said sum of $1,200 to said M. T. McArthur, or to whomsoever he may direct." It is difficult to discover any substantial difference between the decree and the judgment. Each was equally a judgment against the clerk, within the provisions of section 3557 of the Code (1904), declaring that "a decree for land or specific personal property, and a decree or order requiring the payment of money shall have the effect of a judgment for such land, property or money, and shall be embraced by the word 'judgment' where used in any chap

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ter under this title," and it was the duty of the clerk to issue execution thereon as required by section 3581 of the Code. The mandamus, therefore, did not afford, and could not have afforded any greater relief than the petitioner could have obtained by applying for contempt proceedings, but as the trial court had jurisdiction by mandamus to compel its officer to do a merely ministerial act, concerning which he had no discretion, the proceeding by mandamus was not *per se* either void or voidable, and as no objection was raised to it in the trial court, by demurrer or otherwise, its award is not assignable error here. Nor can objection be made now to the awarding of the mandamus for the further reason that it is not mentioned in the petition for the writ of error. *Sands* v. *Stagg*, 105 Va. 444, 452, 52 S. E. 633, 54 S. E. 21, and cases cited; and as the trial court had jurisdiction of the subject matter, objection to the mandamus, if available, could not have been noticed by the court *ex mero motu*. Burks' Pl. & Pr., sec. 205; *South & W. R. Co.* v. *Commonwealth*, 104 Va. 314, 51 S. E. 824; *Hanger* v. *Commonwealth*, 107 Va. 872, 60 S. E. 67.

The proceedings in the circuit court were irregular, and led to confusion in the trial of the question involved, but as the decision on the merits was in favor of the defendant in error, he cannot assign these irregularities as error. This court does not sit to correct all irregularities that may occur on the trial of a cause, but only such errors and irregularities as are prejudicial to the substantial rights of the party assigning them.

The defendant in error filed his petition for a mandamus against the clerk. The clerk answered, disclaiming any interest in the fund, and offering to bring the money into court for its disposition, but alleging that the fund was claimed by the plaintiff in error as assignee of the defendant in error, and asking that his "answer may be treated as an interpleader." On exception to this answer, the court

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refused to accept it as an answer to the petition but accepted it as a statutory interpleader under section 2998, and allowed the plaintiff in error to come in by petition and assert its claim to the fund. Even if it be conceded that section 2998 applies to a petition for a mandamus, the answer of the clerk did not comply with the requirements of that section, and the circuit court erred in directing it "to be treated as an interpleader." There was no reason, however, why the answer should not have been treated as an answer to the petition for the mandamus. The proceeding at common law on an application for a mandamus was very tedious and dilatory. It is set forth with great accuracy and fullness in the opinion of this court delivered by Judge Edward C. Burks in *Page* v. *Clopton*, 30 Gratt. (71 Va.) 415. The same distinguished judge was afterwards one of the revisors of the statute law of the State, and in an address before the Bar Association of the State in July, 1891, he had this to say on the subject: "The proceeding at common law in *Mandamus* and *Prohibition* were very dilatory, and complicated. Former statutes concerning these writs, while making some improvement, were very inadequate. They were omitted in the revision, and an entirely new procedure substituted, which would seem to be clear, simple and expeditions." Burks' Address, page 23. Under this new procedure, to be found in chapter 144 of the Code, the applicant files a petition, "verified by oath, after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application, a reasonable time before such application is made." If defense is made, it is provided that "such defense may be by demurrer or answer on oath, to the petition, or by both." Code, section 3014. The judge of the court is given large vacation powers, and ample provision is made for a jury trial, if either party demands it. It is not stated what defenses may be made by answer, but it would seem that any

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defense may be made which shows that the petitioner is not entitled to the writ prayed for. If, as in the instant case, the defendant is the mere custodian of a fund, in which he claims no interest, but which is in good faith claimed by another, we can see no good reason, under the liberal provisions of the new procedure, why he should not be admitted as a party, and the rights of the parties thus speedily determined in the mandamus proceeding. The error of the circuit court, therefore, consisted in treating the answer of the clerk as an interpleader instead of as an answer to the petition, but the result was the same; the chief difference being that the judge had vacation powers in *mandamus* which are not given to him in interpleader.

It is urged upon us that this case is to be considered as upon a demurrer to the evidence, that the evidence is conflicting, and therefore the judgment of the trial court must be affirmed. It is immaterial whether the case be heard as on a demurrer to the evidence or otherwise. There is no conflict of evidence on the question of the giving of the order to Rouse to pay the money to Rinehart & Dennis Company. McArthur admits that he gave the order. The controversy is over the effect of that order. The trial court did not pass on the validity or effect of the order, or on the state of accounts between the parties, but rested its conclusion solely on the defense of *res judicata*, which will be noticed later. No controverted fact was passed on by the trial court, but solely a question of law. Under such circumstances the judgment of the trial court is not entitled to the weight claimed for it.

We shall now consider the effect of said order. McArthur had deposited the money with the clerk through the medium of his counsel, W. H. Rouse, and thinking it would come back to him, when released, through the same channel, as Rouse testifies, he gave a written direction to Rouse as follows:

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"Bramwell, W. Va., 10/15/15.

"Mr. W. H. Rouse,

"Clintwood, Va.

"Dear Sir:

"When the twelve hundred dollars I have deposited with the Dickenson county court in lieu of bond is of no further service in the *Bucyrus Case,* as security, please pay this amount to the order of Rinehart & Dennis Company, Charlottesville, Va.

"Yours very truly,

(Signed) "M. T. MCARTHUR."

This order was enclosed in a letter to Rouse, in which McArthur says: "In other words, when this money is ready to be turned over to me by the court, it is to be sent to Rinehart & Dennis Co. instead, but it is to remain with the court so long as it is any way necessary." The intention of McArthur at the time he gave this written direction to Rouse is clearly disclosed by his cross-examination as a witness in this cause, as follows:

"Q. Mr. McArthur, was it your intention at the time you gave the order that the money should be paid to the Rinehart & Dennis Company?

"A. Yes.

"Q. At that time you had no other intention but to pay them?

"A. No, sir.

"Q. You signed the order?

"A. I did not sign it.

"Q. You parted with the ownership of the $1,200, and it was to be paid to Rinehart & Dennis Company?

"A. Yes, sir, it was my intention for Rinehart & Dennis Co. to get that money."

McArthur afterwards by letter to W. H. Rouse, dated August 31, 1917, attempted to rescind the order. This letter is as follows:

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"Tams, W. Va., 8/31/17.

"Mr. W. H. Rouse,

"Clintwood, Va.

"Dear Sir:

"I hereby rescind the order for $1,200, given you sometime ago in favor of Rinehart & Dennis Company. We are to have a settlement for work done by M. T. McArthur & Company, Dickenson county, and I do not want this money paid them. Shall ask that you have the clerk of the court forward it to J. R. Simmonds, Johnson City, Tenn.

"Yours very truly,

"M. T. MCARTHUR."

At the time this order was given McArthur was personally indebted to Rinehart & Dennis Company in the sum of $2,500, for a note paid for him, and the latter firm also claimed a large sum of the firm of M. T. McArthur & Company. The note has since been reduced by payments to about $940, and McArthur claims that, upon a fair settlement, he does not now owe Rinehart & Dennis Company anything on the note or otherwise, and that, on the contrary, they are indebted to him.

The order was given as a security, in part, for an existing debt. It was, therefore, founded upon a valuable consideration, and it is immaterial that the beneficiary did not know of it, when given. The subsequent acceptance of it related back to the time it was given. *Evans, Trustee,* v. *Greenhow,* 15 Gratt. (56 Va.) 153. In fact, however, the order to Rouse was requested by letter from Rinehart & Dennis Company, dated October 11, 1915, and was actually given October 15, 1915, and was accepted not later than October 30, 1915. This order thus given and accepted McArthur subsequently, on August 31, 1917, attempted to revoke by a letter to Rouse whom he discharged as counsel, and he now claims that the fund belongs to him.

While the $1,200 was on deposit with the clerk, Mc-

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Arthur gave the order hereinbefore recited to Rouse, who was counsel both for him and for Rinehart & Dennis Company. This order, as we have seen, was supported by a valuable consideration and McArthur intended by it to transfer the fund to Rinehart & Dennis Company. There is no dispute as to these facts, and Rinehart & Dennis Company claim that this constituted a valid equitable assignment of the fund, which was irrevocable by McArthur. This claim, we think, is well founded. Equity looks at the substance of a transaction, and not its mere form. No particular form of words is necessary to constitute a valid assignment in equity of a chose in action. The intention of the assignor is the controlling consideration. If the owner of a chose in action, for a valuable consideration, signs and delivers a writing whereby he intends to part with his ownership, whether it be to the use of the assignee or of a third person, or to apply the proceeds to a specific purpose other than for the use and benefit of the assignor, it is a valid equitable assignment, regardless of the particular language used. It is sufficient if the debtor would be protected in making payment thereon. *Tatum* v. *Ballard*, 94 Va. 370, 26 S. E. 871; *Harlow* v. *Bartlett*, 96 Me. 294, 52 Atl. 638, 90 Am. St. Rep. 346; *Fairbanks* v. *Sargent*, 117 N. Y. 320, 22 N. E. 1039, 6 L. R. A. 475; *Canterbury* v. *Marengo Abstract Co.*, 166 Ala. 231, 52 So. 388, 139 Am. St. Rep. 30; 2 R. C. L., section 21, and cases cited. It is immaterial that Rouse was acting in the capacity of attorney and agent of both McArthur and Rinehart & Dennis Company. The writing was signed by McArthur himself and it was the duty of Rouse, under the terms of the assignment, to collect the money and "pay this amount to the order of Rinehart & Dennis Company." *Smith* v. *Lamberts*, 7 Gratt. (48 Va.) 138. The undisputed evidence in the case measures up fully to these requirements. The case of *Hicks* v. *Roanoke Brick Company*, 94 Va. 741, 27 S. E. 596, has been cited for the

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defendant in error to show that the writing in controversy does not measure up to the requirements of an equitable assignment. We do not so construe that decision. The holding in that case is well set forth in paragraph 3 of the syllabus as follows: "The mere promise of the assignee of a fund not in hand that he will, when and as he receives the fund, pay a debt of the assignor, does not give an equitable lien on the fund, nor operate as an equitable assignment thereof. To constitute an equitable assignment, there must be an assignment of the fund or some definite portion thereof, or an order on the person owing the money to the drawer, or holding funds belonging to him, so that the person owing the debt, or holding the fund on which the order is drawn, can safely pay the order, and is compellable to do so, though forbidden by the drawer."

In that case Patterson, a contractor for work to be done for the city of Roanoke, conveyed all funds coming to him from the city to a trust company, and the latter promised the Roanoke Brick Company that *it would pay*, until further notice, for bricks furnished to Patterson as and when the money therefor was received by it from the city. All that was decided on this point was that this promise of the trust company did not constitute an equitable assignment of any part of the funds in the hands of the trust company. The reasons for the conclusion reached are well expressed by Riely, J., as follows: "Patterson gave no order to the brick company on the city of Roanoke, which was to become his debtor for the construction of the sewers, for the latter to pay to the former for the brick it furnished to him. He did not assign or transfer to it for such purpose any part of the fund thus to become due to him. The agreement, upon which it relies for the creation of an equitable lien in its favor on the said fund, is a mere agreement and promise by the Fidelity Loan and Trust Company to pay, when and as it collects from the city the money it would owe Patter-

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son. This did not operate as an equitable assignment. It gave to the brick company no control of the fund, and the company acquired no lien on it, and further, the condition upon which the Fidelity Loan and Trust Company agreed to pay to the brick company never has been, and now never can be, fulfilled. It only promised to pay out of the fund now in controversy when it received it. The assignment having been annulled, its authority to collect or receive the money coming to Patterson from the city of Roanoke was thereby terminated. The city could not thereafter pay the money to it, and it had no longer any right to receive it. The money never came to its hands, and the occasion when it was to pay the brick company has never arisen, and never can arise."

In the instant case the facts are entirely different. The order is given directly by McArthur himself and he dedicates the entire fund to a particular purpose. He states explicitly that it was his intention at the time the order was given that the money should be paid to Rinehart & Dennis Company; that he parted with the ownership of the $1,200 and intended that Rinehart & Dennis Company should get it. Upon principle, and upon the authorities cited, such dedication constituted a valid equitable assignment of the fund, although the order was directed to Rouse, the attorney of both parties, and who was expected to collect the fund, and not to the clerk who had actual custody of it. The assignment, being a security for an existing debt, was founded on a valuable consideration, and its acceptance will be presumed until the contrary appears. *Evans, Trustee,* v. *Greenhow,* 15 Gratt. (56 Va.) 153, 156. Such an assignment is irrevocable by the assignor.

It has been earnestly insisted that the language used in the order renders the assignment conditional and that in order to constitute a valid equitable assignment "the order must be unconditional." There was no condition about the

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order in question. It transferred unconditionally all interest of the assignor in the fund, and he testifies that such was his intention. The most that can be made out of the language used in the order is that the fund was or might be subject to a prior claim in the *Bucyrus Case.* So far as the assignor was concerned it transferred absolutely and unconditionally all interest he had in it. This was sufficient. We do not mean to concede, however, that a conditional order is not sufficient, if the condition is subsequently fulfilled before the rights of the parties have been in any way altered, as in the case at bar. It is unnecessary to pass upon that question, and we express no opinion upon it.

Finally, it is said that the decree in the *Bucyrus Case* renders the matter in controversy *res judicata,* as the order to Rouse was given nearly two years before that decree was entered and both Rouse and Rinehart & Dennis Company were parties to that suit. This cannot be true. What is not within the pleadings cannot be adjudged. Courts cannot go outside the record and decide issues not made by the pleadings. The record in the *Bucyrus Case* presented no controversy between the plaintiff in error and the defendant in error over the fund in dispute, so far as is disclosed by the record in this case, and the decree directing the clerk to pay the money to the defendant in error left the rights of these parties *inter sese* just where it found them. *Tarter* v. *Wilson,* 95 Va. 19, 27 S. E. 818; *Kelly* v. *Hamblen,* 98 Va. 383, 36 S. E. 491. For cases in other jurisdictions, see 24 Am. & Eng. Enc. Law (2d ed.), 775.

It is stated in the brief for the defendant in error that the decree directing the fund to be paid to the defendant in error was entered by consent, but we are unable to verify that statement from the record in this cause.

For the reasons hereinbefore given the judgment of the circuit court must be reversed, and this court proceeding to enter such judgment as the circuit court should have en-

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tered, will direct the clerk of the Circuit Court of Dickenson county to pay over the fund in controversy to the plaintiff in error.

Reversed.

SIMS, J., concurring:

I concur in the opinion delivered by Judge Burks. I wish, however, to add the following:

I think if the note paid for McArthur by Rinehart & Dennis Company, Inc., for $2,500, which to the extent of $1,200, was the consideration which supported the equitable assignment involved in the case, and which consideration existed at the time such assignment was made, had been paid and satisfied in full before the $1,200 covered by said assignment became payable, then, in equity, McArthur would have had the right thereupon or thereafter to revoke said assignment. For the assignment being made to secure the payment of a debt, itself created a contract between the assignor and assignee which was executory until the money payable thereunder was in fact paid to the assignee. And it was essential to the continued validity of the assignment, after the attempted revocation thereof by his assignor, that the original valuable consideration therefor should have continued to exist at the time the assignee demanded the payment of the money thereunder.

On the question as to whether said consideration continued to exist at the time the assignee, Rinehart & Dennis Company, Inc., demanded the payment of the money thereunder, the record presents the following situation:

The testimony for said assignee is distinct and positive that such consideration so continued to exist, and that a further indebtedness, indeed, existed of McArthur to such assignee, to the aggregate amount of some $30,000. This testimony was *not* given *ore tenus* before the court below,

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but by depositions duly taken elsewhere and read before the court on the hearing of the case.

The testimony of McArthur *was* given *ore tenus* before the court below and on the subject under consideration, and while he testified that he had, after giving said assignment and before his attempted revocation of it, paid on said $2,500 note and reduced the principal thereof to "nine hundred and forty odd dollars," he admitted that the balance still left unpaid and owing thereon "with interest, might bring it into the neighborhood of $1,100 or $1,200." There is, therefore, no real conflict between the evidence for said assignor and said assignee as to the continued existence of the original consideration for said assignment to the extent of said $1,200 thereof at the time the payment of the money thereunder was demanded by the assignee.

The only conflict between the testimony for said assignee and that of said assignor with respect to the indebtedness of the latter to the former is this: The testimony for the assignee is, as aforesaid, that McArthur owed it a total amount of some $30,000 as of the time the depositions aforesaid were taken, to-wit, on November 2, 1917; whereas McArthur, testifying on November 17, 1917, as aforesaid, stated, in substance, that he owed said assignee only about $1,200, the balance on said note as aforesaid; that that was the only debt he owed said assignee as he supposed—(as "I suppose," to use the language of the witness)—and that if there was any other indebtedness to such assignee it was not an indebtedness of his, but "if it is" (an indebtedness of) "anybody it is M. T. McArthur & Company" (to again use the language of the witness). M. T. McArthur & Company was a partnership in which the witness claimed to have an interest. McArthur admits that in May, 1914, M. T. McArthur & Company owed Rinehart & Dennis Company, Inc., $32,000, according to a statement then rendered by the latter. He testified that there were subsequent transactions

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between M. T. McArthur & Company and Rinehart & Dennis Company, Inc., of which he had never been able to get the latter to render a statement of account; that consequently he had employed counsel to bring suit against the latter in a federal court, and that this was the reason he gave the order of attempted revocation of said assignment. As to how the accounts between M. T. McArthur & Company and Rinehart & Dennis Company, Inc., in fact stood or stand, if accurately settled, no sufficient evidence is furnished by McArthur by his own testimony or otherwise, to enable the court below or this court to determine. He does not, indeed, appear to definitely claim that he knows that there would be a balance found due M. T. McArthur & Company, upon such a settlement, in which his interest would be sufficient to cover or amount to a set off against said $1,200 balance of individual indebtedness of his to Rinehart & Dennis Company, Inc. The most that can be said of his testimony is that he had employed counsel to institute suit to obtain such a settlement of accounts between M. T. McArthur & Company and Rinehart & Dennis Company, Inc., and that he will *claim* in such suit that the latter would be found upon such settlement to owe the former to a sufficient amount to give rise to such set off. McArthur, by counsel, declined indeed to go into the question of fact in this suit of how such account stands; the position of such counsel being (as stated in the record) that he objected to certain questions on this subject addressed to McArthur by opposing counsel," * * * because it is immaterial whether they" (Rinehart & Dennis Company, Inc.,) "owe McArthur or McArthur owes them, because if there is a *bona fide* claim that is sufficient in that case, just so there is a *bona fide* belief, and it is none of the court's business at this time."

Therefore, it cannot be said that such testimony of McArthur although heard *ore tenus* by the court below, and

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although full credence were given to it, is sufficient to show that said original consideration to the extent of $1,200 indebtedness from McArthur to Rinehart & Dennis Company, Inc., had been extinguished by the set off aforesaid and no longer existed at the time the payment of said order was demanded by the latter. Nor does it appear from the record that the court below so found as a matter of fact. On the contrary, as pointed out in the majority opinion, the honorable trial judge placed his ruling upon another ground.

For the foregoing reasons, in addition to those set forth in the opinion of Judge Burks, I am of opinion to reverse the judgment of the court below and to enter judgment for the said assignee.

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Staunton.

SNIDOW AND OTHERS v. BOARD OF SUPERVISORS OF GILES COUNTY AND ANOTHER.

September 19, 1918.

1. FERRIES—*Eminent Domain—Taking Franchise Without Compensation.*—A ferry franchise granted by legislative authority exercised by a circuit court is a private property right—an incorporeal heriditament. And to the extent of the right granted by such franchise, such property right is undoubtedly protected by section 58 of article 4 of the Constitution of Virginia of 1902, which provides that the legislature "* * * shall not enact any law whereby private property shall be taken or damaged for public use without just compensation."
2. FRANCHISE—*How Far Exclusive—Right of Sovereign.*—A franchise may be granted as exclusive as against some persons and not as against others. That is to say, a franchise may be, and most often is, granted as exclusive as against all persons other than the sovereign granting it, but not as exclusive in the sense that the sovereign may not itself subsequently exercise or grant to another the right to exercise the same or a similar franchise so near the same locality occupied by that first granted as to interfere with and perhaps wholly to destroy the income enjoyed by the latter from such prior franchise and the investment of capital therein. Consequently, there is a most important and fundamental difference between the rights of holders of franchises in controversies with rival operations, where the latter are not authorized by legislative authority, from the cases where the rival operations are so authorized.
3. FERRIES—*Franchise—Exclusiveness—Bridge Erected Near by Without Legislative Authority.*—In a controversy between the owner of a ferry, which is exclusive as against all others not acting under legislative authority and is derived by legislative grant, and a person or corporation, not acting under legislative grant, purporting to authorize such action without liability for damages, where a bridge across the same stream is erected and operated by the latter so near to the ferry as to draw away its custom, this will be held to be an infringement of the ferry franchise, although the approaches and operation of the ferry

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may not be physically obstructed thereby; and such owner or operator of the bridge will be liable in damages to the owner of the ferry for drawing away the custom of the latter.

4. FERRIES—*Exclusiveness—Eminent Domain—Taking Private Property Without Just Compensation.*—If a ferry or bridge is established under a franchise granted by legislative authority as exclusive against the sovereign State, the location and operation by legislative authority of a later rival ferry or bridge so near to the first established as to draw away the travel from it, amounts to a *taking* of the property right in the first ferry, within the constitutional inhibition against the taking of private property for public use without just compensation.

5. FERRIES—*Franchise—Impairment of Obligation of Contracts.*—An express grant of an exclusive franchise as against the sovereign State is a contract between the grantee and the State and any subsequent act of the legislature of the State impairing its obligation is void under the federal Constitution.

6. FERRIES — *Franchise — Exclusiveness — Construction of Grant.*—Whether the grant of a franchise (such as that under consideration, to-wit, of a ferry) is exclusive as against the sovereign State, is to be determined by the construction of the grant itself. And the grant will be strictly construed against the grantee and in favor of the sovereign; and such a grant will not be deemed exclusive unless expressly so stated in the grant itself or such conclusion arises by necessary implication from the express language of the grant.

7. FERRIES — *Franchise — Exclusiveness — Construction of Grant—Right of Legislature to Establish Rival Ferry.*—A grant of a ferry franchise by an act of the legislature, or by a court acting under legislative authority, merely giving the authority to establish and operate a ferry, does not confer an exclusive right, so as to deprive the legislature of power to subsequently authorize another ferry or bridge near the same place (it not being in the same location), without infringing upon the prior grant. And the fact, at the time of the grant of the ferry franchise, there was a general statute (section 1386 of the Code of 1904) in existence, providing that no *court* should grant leave to establish a ferry within half a mile of another ferry legally established, does not change the rule of construction.

8. BRIDGES—*Establishment—Special Road Law of Giles County—Acts 1908, page 611; Code of 1904, section 944-a.*—The special road law for Giles county (Acts 1908, page 611) does not expressly repeal section 944-a, Code of 1904, so far as applicable to the taking of initial action for the establishment and location of new bridges in Giles county by the board of supervisors; nor does it do so by necessary implication; such action of the

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board of supervisors not undertaking or purporting to extend to the condemnation of land for use for the location of the bridge, or for its approaches, jurisdiction over which matters is conferred on boards of supervisors by said section 944-a as the general law of the State. The latter jurisdiction was taken away from the board of supervisors of Giles county and conferred on the road commission.

9. BRIDGES—*Establishment—Special Road Law of Giles County—Acts 1908, page 611; Code of 1904, section 944-a.*—Under the special road law of Giles county (Acts 1908, page 611) and the general statute law of the State as to roads and bridges, the initial determination that a bridge should be established and its location, the determination of the plans and specifications for the bridge and its approaches, the erection of the bridge and its approaches, are left under the jurisdiction of the board of supervisors, subject to the limitation that the erection or supervision of the work of the erection of the bridge and its approaches, must be under the road commissioner, or commissioners, in whose district the work is located, whereas the location of the approaches as they recede from the bridge, the acquisition or condemnation of the right of way for the bridge and its approaches, are transferred to the jurisdiction of the road commission.

10. FERRIES—*Exclusive Franchise—Establishment of Bridge—Case at Bar.*—In the case at bar, since the board of supervisors and road commission acted under legislative authority, authorizing, and, as to the former, also validating, their action in locating and establishing the bridge, together with its approaches, in question, such bridge (with its approaches), in so far as they do not physically obstruct the approaches to the ferry of appellants, did not infringe upon the property rights of appellants in said ferry, and hence will not, by its drawing away the custom in public travel from such ferry, even though it result in the total withdrawal of such custom therefrom, *take*, or *damage*, the property of appellants within the meaning of section 58 of the Constitution of 1902. And in the instant case there was no evidence tending to show that either of the approaches to the landings of the ferry will be in any way obstructed by the bridge or its approaches. But should the actual construction of the approaches to the bridge physically obstruct the public road approaches to the ferry, the proceedings in the instant cause would furnish no bar against the owners of the ferry in further proceedings to assert their right.

11. STREETS AND HIGHWAYS—*Establishment of New Road—Special Road Law of Giles County.*—In the instant case, it was objected by appellants that the district board of road commis-

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sioners for Pembroke district undertook to make certain changes in the road in question, which could be done only in conjunction with the district board of *Pembroke* (Pearisburg) district, as provided for by the road act of Giles county, since both districts would be affected by such change.

Held: That the provision relied on by appellants only applied where the application is for a new road or changing of an existing road, which is "in more than one district," and, therefore, had no application in the instant case, as the road in question was wholly in the Pembroke district.

12. STREETS AND HIGHWAYS—*Eminent Domain—Notice—Due Process of Law—Case at Bar.*—The special road law of Giles county constituted the road commission a court, with power of adjournment from time to time and from place to place, and conferred upon it the jurisdiction to disregard the route of the road proposed in the application therefor and to choose and establish a wholly different location therefor. Appellants having been duly summoned before the road commission at the time and place of their initial meeting were thereby duly made parties to all the subsequent proceedings of the road commission, including a change in the location of the road; were thus given their day in court; and were bound by such proceedings, under the provisions of such special road law, except as they might be relieved therefrom upon appeal taken in accordance therewith. Thus were the appellants afforded due process of law, including a trial by jury as provided for in such statute.

Error to a judgment of the Circuit Court of Giles county. Judgment for defendants. Plaintiffs assign error.

Affirmed.

This is an appeal by the appellants, the land and ferry owners affected thereby, from a judgment of the Circuit Court for Giles county, entered in accordance with the verdict of a jury on the trial of an appeal to such circuit court by appellants from the action of the board of supervisors of Giles county (hereinafter designated "board of supervisors"), taking certain initial steps in locating and establishing, and in contracting for and proceeding with the erection of a new bridge across New river, near Pembroke

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in said county, and from the action of the district board of road commissioners for Pembroke district of Giles county (hereinafter designated "road commissioners") in establishing a road for, and in its allowance of only twenty-five ($25.00) dollars damages to appellants (being for their land taken) by the location of a portion of the approach to the eastern end of said bridge, being the extreme eastern approach to such bridge from the existing public road.

At the time of the commencement of the proceedings, and of the judgment complained of, the appellants were the owners and operators of a public ferry across New river, near Pembroke in said county, the franchise for which was granted under the general statute law of the State of Virginia by order of the Circuit Court for Giles county on June 21, 1892, in the usual form for such an order. The landing of the ferry on the eastern side of the river was "at the point where the public road comes to the bank of said New river * * * on the lands of * * *" (the appellants), and the landing of the ferry on the western side of such river was on the land belonging at the time of the granting of the franchise aforesaid to the Mt. Lake Land Company, and, at the time of said proceedings and judgment, to the Norfolk and Western Railway Company.

There was no provision in the order of court granting said franchise which purported to give appellants such franchise in exclusion of the right of the Commonwealth to subsequently grant to others the authority to open and use for private or public benefit, another ferry or bridge across said river, in a location alongside of, or near by, the ferry of appellant.

The general statute law of the Commonwealth at the time of the granting of said ferry franchise to appellant contained (and, indeed, until the present time still contains) the following provision:

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"That no court shall grant leave to establish over a water course a ferry within half a mile of any other ferry legally established over the same water course." (See Pollard's Code of Virginia, section 1386.)

The board of supervisors in the instant case rely upon section 944a of the Code of Virginia, and the special act of the legislature (Acts of Assembly, 1916, page 548), and the road commission upon the special road law for Giles county, contained in Acts of Assembly, 1908, page 611, as giving them, respectively, legislative authority for their action which is complained of by appellants.

Said section 944a, so far as material, is as follows:

"Section 944a. *Establishment* * * * *of* * * * *for building* * * * of all * * * public bridges * * *."

"(2) Whenever * * * any person applies to the board" (of supervisors) "to have a road * * * therein established * * * it may appoint five viewers, * * * any three of whom may act, to examine such roads or routes, and report upon the expediency * * * of establishing any new road, or building * * * any bridge * * *."

Subsection (3) of such statute provides for the report of the viewers, specifying certain specific matters required to be reported upon, among which are "the names of the land owners" on the route in favor of which their report may be made; "which of such land owners require compensation" for the land to be "taken and for damages to the residue of the tract, beyond the peculiar benefit to be derived in respect to such residue from the road * * * to be established;" and "all other facts and circumstances in their opinion useful in enabling the board of supervisors to determine the expediency of establishing * * * the *road* * * * and they shall forthwith file their report with the clerk of the board."

Subsections (4) and (5) of such statute provides for fur-

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ther proceedings, where same are taken under such general road law, for summons of the land owners affected, giving them a day before the board of supervisors to make defense against the establishment of the road (which also involves the right of defense against the establishment of a *bridge*), and in the matter of the damages proposed to be allowed to them by such board in case the board be of opinion that the *road* (which covers also a bridge) should be established.

Under such statute the board of supervisors in the instant case, by order entered October 5, 1915, on the application of certain citizens of Giles county "for the location and establishment of a wagon bridge across New river at Pembroke" appointed five viewers (John F. Williams and others), any three of whom might act, "to meet at the proposed location for said bridge and examine the same and other localities in that vicinity and report in favor of the one they prefer, with their reasons for the preference" and further directed specifically the report required by the last named statute. Four of the viewers thus appointed acted on October 22, 1915, and filed their report in writing to the board of supervisors promptly with the clerk of the board, in which they reported in favor of the location of the proposed bridge so that the eastern end of it would be located about 272 feet down the river (in a northerly direction) from the ferry landing of appellants on the eastern side of said river (the bridge and its approaches on that side of the river to be located, not on, but below the land of appellants, upon the land of others); and the western end of the bridge to be located about 154 feet down the river from the ferry landing of appellants on the western side of said river, on the right of way of the Norfolk and Western Railway Company, by an overhead railway crossing; and accompanied their report with an offer in writing from said railway company to donate $7,000 towards the erection of the bridge provided it should cross its tracks overhead and "eliminate

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the present grade crossing" going to the landing of the ferry of appellants on the western side of said river. The viewers submitted with their report "an estimate from the Virginia Bridge and Iron Company of Roanoke, Va., for the erection of such bridge, giving figures for the proposed bridge and also the overhead crossing desired by the Norfolk and Western Railway."

It appears from the record in the instant case that by resolution of the board of supervisors "entered of record on the eighth day of November, 1915" * * * the said report of said viewers "was approved and adopted."

It further appears from the record in the instant case that three of said viewers who made said report subsequently, to-wit, on November 27, 1915, united in a writing recommending to the board of supervisors "that the location of the eastern end of said bridge be so changed as to bring it to a point 195 feet below the said * * * ferry landing" (of appellant on the eastern side of said river) "for the reason that it can be more readily reached by a public road to that point."

Whereupon, by order of the board of supervisors entered on November 29, 1915, it was resolved "that the location of said bridge be so changed as to place the center thereof, on the eastern side of the river, at low water mark, at a point 195 feet below the present eastern landing of the * * *" (appellants) "ferry, and on the land of * * *" (appellants); "the approach thereto to extend back to the land of * * *" (others than appellants) "so as to come into the present public road at a point in front of H. F. Snidow's house" and to make the location of the western end of the bridge about 100 feet below the ferry landing on the western side of the river. There was no provision in this order for the letting of the contract for the erection of said bridge, nor with respect to any overhead crossing of the Norfolk and Western Railway tracks on the western side of the

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river, or for the elimination of the grade crossing of such tracks approaching the ferry landing of appellants on the western side of the river. And there is no evidence in the record that the elimination of the approach to the ferry landing aforesaid on the western side of the river was ever in fact decided upon.

Subsequently the special act of the legislature aforesaid (Acts 1916, page 548) was adopted and went into effect March 20, 1916, which so far as material, was as follows:

"1. Be it enacted by the General Assembly of Virginia, that the county of Giles be and it is hereby authorized to construct and maintain a public free highway bridge or bridges across New river at such a point or points in said county as may have been heretofore selected by commissioners appointed by the board of supervisors of said county for that purpose * * *."

Prior to the special act of Assembly last mentioned, however, to-wit, at some time between November 8 and 29, 1915, four citizens of said county (to-wit, John F. Williams and three others), made application in writing to said road commission as follows:

"To the Board of Road Commissioners for Pembroke District, in Giles county, Va.:

"Your undersigned petitioners, who are resident freeholders of the county of Giles, respectfully represent unto you that the board of supervisors of Giles county, by an order entered on its records on the 8th day of November, 1915, established the location of a wagon bridge across New river at Pembroke, the eastern end of which bridge will land about 275 to 300 feet below the ferry landing of" (the appellants—naming two of them) "and said board of supervisors is now ready to contract for the construction of said bridge.

"In order to reach the eastern end of said bridge and to

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provide proper approach thereto and ground upon which to erect necessary piers therefor, it will be necessary to have a change of the public road.

"Your petitioners therefore pray that you go upon the ground and view the same and make and establish such change in the county road as may be necessary to secure a proper approach to said bridge and location for necessary piers and abutments upon which said bridge shall be erected, said change to begin at a point in the present public road about opposite the house of said Henley F. Snidow, thence in front of the store house of said Henley F. Snidow, thence to the river bank where the landing of said proposed bridge has been located as aforesaid and thence to the middle of New river on the line of said bridge.

"Said change of public road will probably pass through the land of" * * * (appellants and others, naming them).

"May proper summons issue and your report be made as the law directs."

(Signed) "T. Gilbert Porterfield,
"A. W. Lumsden,
"John F. Williams,
"F. F. Farrier,
"By Counsel."

Following the latter application the road commission made the following report dated November 29, 1915, of their action on such application, namely:

"To Hon. Fulton Kegley, Judge of the Circuit Court of Giles county, Va.:

"In pursuance of a summons issued by the clerk of your honor's court on the petition of John F. Williams and others asking for the establishment of a road in the Pembroke district near the Snidow" (appellant's) "ferry on the eastern side of New river at Pembroke, Va., for the purpose of acquiring necessary ground on which to erect a wagon bridge

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proposed to be erected across New river at that point, and for the necessary approach to said bridge, your undersigned, J. T. S. Hoge and C. B. Williams, who constitute the board of road commissioners for said Pembroke district, went on the ground, on Saturday, November 27, 1915, the day fixed in said summons, there being also then present * * *" (two of appellants and others—naming them) "land owners who had also been duly summoned; Mrs. Vira Snidow" (another of appellants) "having also been summoned not being present in person;

"After viewing the ground and considering the location of the proposed bridge, as fixed by John F. Williams and others, commissioners heretofore appointed for that purpose, and the character of the approach to said bridge, we were of opinion that it would be much better if the location of the eastern end of said bridge could be changed to a point 195 feet below the Snidow ferry landing instead of 272 feet below said landing as recommended by said bridge commissioners; and the undersigned J. T. S. Hoge, who is also chairman of the board of supervisors of Giles county, knowing that said board of supervisors were to have a meeting in the courthouse of Giles county on this day, we adjourned to meet here at the courthouse on this day and confer with the said board of supervisors with a view to having the location of said bridge changed; and

"Whereas, it being made known to us that the said board of supervisors now in session, and having before them three of said bridge commissioners, have entered an order and resolution which is concurred in by the bridge commissioners, changing the location of the eastern end of said bridge so as to locate the center thereof, at low water mark, on the eastern side of the river, at a point 195 feet below the present ferry landing of the Snidow ferry, and the approach thereto to extend back over the land of * * *" (appellants and others—naming them), "and come into the present public road in front of H. T. Snidow's store house.

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"Now in consideration of all the foregoing and of all the facts and circumstances in connection therewith, we hereby establish a public road thirty feet in width, beginning at a point in front of H. F. Snidow's store house and running from there directly toward the river, passing through the southern end of said H. F. Snidow's lot and then about seventy-five feet through the land of * * *" (appellants) "to a point on the bank of the river at low water mark, the center of which is to be 195 feet below the present eastern landing of the Snidow ferry, and from thence on the line of said bridge as located by the order of the board of supervisors this day entered, to the center of New river.

"*It is expressly understood that the establishment of this road shall not be construed to discontinue the present road to the Snidow ferry landing but said road shall be left open so as not to interfere with the public travel to and from said ferry.*

"We have allowed * * *" (appellants) "jointly, the sum of $25.00 damages, on account of the location of said road through their lands, and to H. F. Snidow and wife $25.00.

"Given under our hands this 29th November, 1915." (Italics supplied.)

(Signed) "J. T. S. Hoge,
"C. B. Williams."

The last named application was made and the action of the road commission appearing from the last named report was taken under the above mentioned special road law for Giles county (Acts 1908, page 611) which, so far as material, is as follows:

"That for the purpose of establishing, altering * * * the roads and bridges of Giles county * * there shall be and is hereby created for each magisterial district in said county, a board of road commissioners, to be composed

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of the supervisors for the district and a road commissioner for that district." Then follow provisions for the election of the road commissioners and for their qualification and compensation. The act thereupon further provides: "That application for a new road or changing * * an existing road, must be upon written petition addressed to the district board of road commissioners in which such road is now or is asked to be located, in which a part thereof is, stating specifically the change, the *continuance*" (evidently a misprint for *discontinuance*), "or route of the new road from point to point, also stating the names of the land owners through whose lands the proposed new road or alteration extends, which shall be signed by petitioner or his counsel and forwarded to the clerk of the circuit court of Giles county, who shall forthwith issue a summons to the members of the road commission in whose district the proposed road, alteration or discontinuance is; and, *if in more than one district, then also to the members of the commission of any other district affected thereby,* to appear at a point on the proposed road, change, alteration or discontinuance to be named in the summons at the time named therein * * * and together they shall view said route for a new road, change or discontinuance, and hear such evidence relevant thereto as may be offered them, and cause said changes, new road or discontinuance to be made in accordance with said application; or, *if such commission, upon a view of such proposed route, is of opinion that a better location for such proposed new road or changes can be obtained* by reviewing another route, *then, in that event, the said commission may cause such change to be made,* or new road to be opened, and in their report give the reasons for the alteration made from the location specified in the petition, stating clearly and specially the change of route of the new road from point to point, *also stating the names of the land owners through whose lands the proposed new*

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road or alteration *extends*, or report adversely according to their judgment. *They* or *either of them attending, may adjourn the proceedings from time to time and place to place* * *. The clerk of the said circuit court of Giles county will, at the time of the issuance of the summons to the members of the road commission, *issue a summons to the land-holders named in said petition to appear at the same time and place named in the summons to the road commission to show cause against the establishment, alteration* or discontinuance * *."

* * * * * * * *

"4. Should said commission establish a road or make any change or alteration in the same, they shall assess the damages to the land owners and file in the clerk's office of the circuit court of Giles county a report of their action, with a full description of the road established, alteration or road discontinued, stating the width * * of the new road established and alterations made * * *; and said report made by said commission establishing a road or making any changes or alteration in an existing road shall be final, except as hereinafter provided; *but any land owner damaged* * * *shall have* the right to appeal to the circuit court, if the sum reported by the commission or commissioners is deemed by him or any of them insufficient * *. If any land owner damaged desires to appeal to the circuit court on the question of damages, he may, within thirty days after said report is filed in the clerk's office of the circuit court, apply to said circuit court, or to the judge thereof in vacation, for an appeal on said question of damages * * and the same shall be allowed by said court or judge and the cause be placed on the docket for trial at the next term of the circuit court * *.

"5. A trial of said appeal shall be by jury * * and without formal pleading, and *shall be final except to appeal as to points of law.*

* * * * * * * *

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"13. * * * The building * * of any bridge * * in said county shall be directed by the commissioner of the respective districts, after any bridge shall have been directed to be built *as now prescribed by law.*" (Italics supplied.)

The appellants in the circuit court demurred to and moved to quash the proceedings of the board of supervisors and road commission on the following grounds, viz.:

"(a). Because the record shows that the board of supervisors undertook to locate and build the road bridge under the general law of the State. This law (944a, clauses 4, 5 and 6) provides that before an order of a board shall become final and binding, the land owners affected thereby shall be cited to appear so that they may show cause, etc., against the establishment thereof, and so that the board sitting as a court may likewise hear and determine a just compensation for the land proposed to be taken and the damage accruing therefrom. Neither of these opportunities were afforded petitioners, and they submit that thereby they have been put to extra and great costs in attempting to have their cause heard and determined. This was a denial by the said authorities of your petitioners to have their day in court.

"(b). Because the district board of road commissioners for Pembroke district undertook to make certain changes in the road in question, which could be done only in conjunction with the district board of *Pembroke* (Pearisburg) district, as provided for by the road act of Giles county, since both districts would be affected by such change. It is respectfully submitted and urged that for this reason also the said demurrer and motion to quash should have been sustained."

Such demurrer and motion were overruled by the court below. This action of the trial court is assigned as error by the appellants.

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Thereupon a trial by jury was had which resulted in the verdict of the jury aforesaid. Whereupon the appellants moved the court to set the verdict aside as (a) contrary to law, (b) because of the improper admission of evidence, (c) because of the exclusion of proper evidence and (d) because of misdirection of the jury; which motion the trial court also overruled and this action is also assigned as error by the appellants.

The testimony excluded by the court, referred to in said motion to set aside the verdict, was (so far as material to be mentioned) certain testimony offered by the appellants tending to show the capital they had invested in the ferry, the value of the ferry franchise and the consequent loss and damage the appellants would sustain by reason of the physical obstruction of the public road approach to the landing of their ferry on the eastern side of the river heretofore existing (which obstruction the appellants allege will result from the construction of the approach to said bridge at its eastern end); and the further consequent loss and damage the appellants will sustain by the diversion of travel from their ferry which will be caused by the location and establishment of the said bridge as a free bridge, open to the public, in such close proximity to their ferry.

The uncontroverted fact is that the bridge itself does not touch or affect either of the approaches to the ferry.

The testimony admitted by the court, referred to in said motion to set aside the verdict, was certain testimony introduced by the appellees to the effect that the only contract, for the construction of the abutments and approaches to the bridge, which had been in fact entered into at any time, was for the abutement and approach to it on the eastern end of the bridge, which was made by the board of supervisors with the Virginia Bridge and Iron Company, of Roanoke, Va., on June 7, 1916, and that such construction, as contracted for, and as in fact being made, would not result

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in any physical obstruction of said public road approach to appellants' ferry landing on the eastern side of the river.

On the question whether the construction last above referred to would result in any physical obstruction of said approach to the landing of said ferry on the eastern side of the river, the appellants introduced evidence tending to show that if such construction was made in accordance with certain plans therefor, which were being considered by the board of supervisors at the time the condemnation proceedings aforesaid were instituted and prior to the time the damages aforesaid were assessed in favor of appellants by the road commission as aforesaid, such construction would have resulted in the physical obstruction of said public road approach to said eastern ferry landing. But there was no evidence introduced for appellants, or otherwise in the case, tending to show that such earlier plans were ever decided upon by the board of supervisors for the construction of the approaches to the bridge. And there was no evidence introduced for appellants, or otherwise in the case, tending to show that the construction of the approaches to the bridge as in fact decided upon and contracted for by the board of supervisors, would physically obstruct in any way the approaches to the ferry landings of the appellants, either on the eastern or western side of the river.

The instruction complained of, as aforesaid, which was given to the jury, was as follows:

"By the Court: Gentlemen of the jury: This case is to be submitted to you without argument upon the instructions of the court. You will not take into consideration any evidence relating to any damages to this ferry or to the ferry franchise or the ferry rights in any way. According to my theory all those matters have nothing to do with this case you are here to try. You are only to consider those things as damages referred to in this instruction. The

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court instructs the jury that in assessing the damage in this case they shall ascertain from the evidence and say what will be a just compensation for the land taken and for the damage to the residue of the tract of land beyond the peculiar benefit to be derived in respect to such residue from the road and bridge established."

R. W. Kime and *H. M. Fox*, for the plaintiffs in error.

Williams & Farrier and *W. B. Snidow*, for the defendants in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error raise the questions which will be considered and disposed of in their order as stated below.

1. It is settled by the authorities that the ferry of the appellants is a private property right—an incorporeal hereditament—acquired from the Commonwealth, granted by legislative authority exercised by the circuit court per its order of June 21, 1892, above referred to, which granted to appellants the franchise for such ferry. *Patrick* v. *Ruffin*, 2 Rob. (41 Va.) 209, 40 Am. Dec. 740; *Conway* v. *Taylor*, 1 Black, 603, 17 L. Ed. U. S. Supreme Ct. Rep. 191, 11 R. C. L., p. 926. And to the extent of the right granted by such franchise, such property right is undoubtedly protected by sec. 58 of Art. 4 of the Constitution of Virginia of 1902, which provides that the legislature "* * shall not enact any law whereby private property shall be taken or damaged for public use without just compensation." *Mason* v. *Harper's Ferry Bridge Co.*, 17 W. Va. 396; 4 R. C. L., p. 199; Lewis on Em. Dom. (2nd ed.) sec. 228, and note thereto.

But the question remains: What is the extent of the

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property right granted? When is it infringed upon? How exclusive is it?

There is a distinction drawn by many of the authorities in England and in the United States between a franchise for a ferry and a franchise for a bridge; some holding that the operation of the one does not infringe upon a franchise for the other. In view of the conclusions hereinafter stated, it will be unnecessary for us to enter upon any consideration of that distinction. For the purposes of this case we may assume that the operation of a rival bridge will as much infringe upon a nearby ferry previously established, as would be a rival ferry in the same locality.

2. Throughout the further consideration of the subject in hand there is, however, an important distinction which must be borne in mind, which underlies the authorities on the subject in a controlling way, but which is seldom referred to therein in express terms. That distinction is that a franchise may be granted as exclusive as against some persons and not as against others. That is to say, a franchise may be, and most often is, granted as exclusive as against all persons other than the sovereign granting it, but not as exclusive in the sense that the sovereign may not itself subsequently exercise or grant to another the right to exercise the same or a similar franchise so near the same locality occupied by that first granted as to interfere with and perhaps wholly to destroy the income enjoyed by the latter from such prior franchise and the investment of capital therein. Conseuently, there is a most important and fundamental difference between the rights of holders of franchises in controversies with rival operations, where the latter are not authorized by legislative authority, from the cases where the rival operations are so authorized.

3. In England, even though the ferry franchise is exclusive as against all others not acting under legislative authority, and is derived, not under legislative grant by act

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of Parliament, but by grant from the Crown, it is settled by the modern decisions (overruling earlier holdings to the contrary), that in a controversy between the owner of the ferry and a person or corporation erecting and operating a bridge across the same stream so near to the ferry as to draw away its custom, where such bridge is not erected under legislative authority purporting to authorize it without liability for damages, and where the latter does not physically obstruct the approach to or operation of the ferry, the erection and operation of the bridge is not an infringement of the ferry franchise and does not render the owner or operator of the bridge liable in damages to the owner of the ferry, although the practical effect of the operation of the bridge may be to draw away all custom from the ferry, so as to wholly destroy the value of the ferry franchise. *Dibden* v. *Skirrow*, 12 Am. & Eng. Anno. Cas. 252; overruling *Regina* v. *Cambrian*, L. R. 6 Q. B. 422, which is cited in many of the early American cases.

In the United States, however, the weight of authority establishes the doctrine that in a controversy between the owner of a ferry, which is exclusive as against all others not acting under legislative authority and is derived by legislative grant, and a person or corporation, not acting under legislative grant purporting to authorize such action without liability for damages, where a bridge across the same stream is erected and operated by the latter so near to the ferry as to draw away its custom, this will be held to be an infringement of the ferry franchise, although the approaches and operation of the ferry may not be physically obstructed thereby; and such owner or operator of the bridge will be liable in damages to the owner of the ferry for drawing away the custom of the latter. See note to 12 Am. & Eng. Anno. Cas. 252, and American cases cited. In such case the rival bridge is treated in all respects as if it were a rival ferry, which could not at common law have

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been so located without liability in damages for drawing away the travel and thereby diminishing the value of the franchise. *Smith* v. *Harkins*, 38 N. C. 613, 44 Am. Dec. 83; *Norris* v. *Farmers, etc., Co.*, 6 Cal. 590, 65 Am. Dec. 535, and authorities therein cited.

This difference between the doctrine on this subject prevailing in England and in the United States may be reconciled in principle by the consideration of the difference between the power of the Crown to grant franchises in derogation of common right and the power of the legislatures of the States in that regard. The power of the former, under consideration, was limited by the common law of England to its exercise for the public benefit. Beyond that no grant from the Crown was valid. Whereas, the power of our State legislatures, where unrestricted by the State Constitutions (and they are generally, if not universally, unrestricted in that behalf), is unlimited, and is as plenary as the power of Parliament in England over the subject. The controlling distinction between the English and American cases referred to, therefore, is this; that, in the former, the private property right in the ferry held under grant from the Crown is limited as aforesaid; whereas such private property right in the ferry held under legislative grant from our States is unlimited, as against a rival ferry or bridge located so near by as to draw away custom of travel from the ferry first established, where the second ferry or bridge is not itself operated under legislative authority as aforesaid. The same rule applies to rival bridges and to a rival ferry to a bridge first established. See authorities above cited.

It should be noted, however, that the American doctrine, referred to, is applicable, (1), only where (as is universally true, of course, in the United States) the franchise for the ferry or bridge first established is derived under legislative authority, and (2), where the later rival ferry or bridge, is

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not operated under legislative authority, such as aforesaid. In such case the franchise for the ferry or bridge first established is held, under the American doctrine, to be an exclusive franchise as against all others not acting under the legislative authority aforesaid. *Mason* v. *Harper's Ferry Bridge Co., supra,* 17 W. Va. 396; *Norris* v. *Farmers. etc., Co., supra,* 6 Cal. 590, 65 Am. Dec. 535; *Gates* v. *McDaniel,* 2 Stev. (Ala.), 211, 19 Am. Dec. 49; Note of American authorities in 12 Am. & Eng. Anno. Cas. following the case at p. 252. And the location and operation of a later rival ferry or bridge so near to the first established as to draw away the travel from the latter, by one not acting under legislative authority purporting to authorize such action under the rule of *damnum absque injuria,* will be held not only to *damage* the private property right in the first established ferry or bridge, but to be a *taking* of such private property right, in such prior ferry or bridge, within the constitutional inhibition against the taking of private property for public use without just compensation. *Mason* v. *Harper's Ferry Bridge Co., supra,* 17 W. Va. 396: Lewis on Em. Dom. (2nd ed.) sec. 137 and authorities cited and sec. 228 and note thereto. And the same is true where the later rival ferry or bridge is itself located and operated under legislative authority which does purport to authorize such action under the rule of *damnum absque injuria,* if the prior ferry or bridge was established under a franchise granted by legislative authority as exclusive against the sovereign State, *by the express terms of the grant* (as held by some of the authorities) or *by necessary implication* from *the express terms of the grant* (as held by other authorities). 1 Minor on Real Prop., sec. 69; *Piscataqua Bridge Co.* v. *N. H. Bridge Co.,* 7 N. H. 35; *Chenango Bridge Co.* v. *Binghamton Bridge Co.,* 3 *Wall,* 51, 18 L. Ed. 137; *Power* v. *The Village of Athens,* 99 N. Y. 592, 2 N. E. 609. And such an express grant of an exclusive franchise

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as against the sovereign State is a contract between the grantee and the State and any subsequent act of the legislature of the State impairing its obligation is void under the federal Constitution. Lewis on Em. Dom., *supra* (sec. 137) and authorities cited.

While the above is true, it is nevertheless well settled that whether the grant of a franchise (such as that under consideration, to-wit, of a ferry) is exclusive in the sense last above used, is to be determined by the construction of the grant itself. And the rule universally applied by the authorities to such construction is that the grant will be strictly construed against the grantee and in favor of the sovereign; and that such a grant will not be deemed exclusive unless expressly so stated in the grant itself or such conclusion arises by necessary implication from the express language of the grant. Lewis on Em. Dom., *supra*, secs. 136, 138 and authorities cited; also *Tuckahoe Company* v. *T. & J. R. Co.*, 11 Leigh (38 Va.) 42, 36 Am. Dec. 374; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773. And a grant of such a franchise by an act of the legislature, or by a court acting under legislative authority, merely giving the authority to establish and operate a ferry, does not confer an exclusive right, so as to deprive the legislature of power to subsequently authorize another ferry or bridge near the same place, it not being in the same location, without infringing upon the prior grant. Lewis on Em. Dom., *supra*, (sec. 136); *Somerville* v. *Wimbish*, 7 Gratt. (48 Va.) 205; *Bush* v. *Peru Bridge Co.*, 3 Ind. 21; 1 Minor on Real Prop., sec. 69. And the fact that, at the time of the grant of a ferry franchise, there was the general statute (sec. 1386 of Code of Va. above quoted) in existence (which is relied on by appellants), does not change the rule of construction under consideration, as was expressly held in the following cases: *Williams* v. *Wingo*, 177 U. S. 601, 20 Sup. Ct. 793, 44 L. Ed. 905; *Mason* v. *Harper's*

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Ferry Bridge Co., supra, 17 W. Va. 396; *Somerville* v. *Wimbish, supra,* 7 Gratt. 48 Va., 205.

It is true that in the case of *Mason* v. *Harper's Ferry Bridge Co.,* just cited, it is held that the rival bridge company was compelled to pay damages for diverting tolls from the previously established ferry near by, but this holding was made on the ground that although the bridge company acted also under legislative authority under its charter franchise, such charter, pursuant to the statutes of West Virginia on the subject, was conditioned upon its paying damages of that character. That is to say, there was nothing in the statute law under which the bridge company derived its right to erect and operate the rival bridge which indicated that the legislature intended to grant to it the authority so to do without liability for damages. And such West Virginia case expressly holds that if the legislature had granted the bridge company such authority, it had the power to do so, and, in such case, there would have been no infringement of the prior ferry franchise and no liability on the part of the bridge company in damages therefor.

It is also true that in the case of the *Binghamton Bridge,* 3 Wall. 51, 18 L. Ed. 137, *sub. nom. Chenango Bridge Co.* v. *Binghamton Bridge Co.,* 3 Wall. 51, 18 L. Ed. 137, where the act of the legislature, authorizing the older bridge, contained the proviso "that it should not be lawful for *any person or persons* to erect a bridge within a distance of two miles" (italics supplied), that provision was held to be a part of the contract between the State and the bridge company, but that decision, as pointed out in the subsequent case of *Williams* v. *Wingo, supra,* 177 U. S. 601, 20 Sup. Ct. 793, 44 L. Ed. 905, rests upon the peculiar language of such act of the legislature and, as also pointed out in the last named case, is not in conflict with the holding in such case aforesaid, that the Virginia statute aforesaid (sec. 1386 of the Code) will not be held to be a part of the grant

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of a ferry franchise made while such statute was in force, so as to confer such franchise as exclusive, as against the power of the legislature to pass a subsequent act authorizing a county to establish a ferry within half a mile of the former ferry.

4. In the instant case the board of supervisors claim that they had legislative authority to take the initial action they did to establish the rival bridge in question under statute (sec. 944-a above cited, and the material portions of which are above quoted), and that, if not, its said action under such statute in the matter of locating and establishing the bridge was validated by the special act of Assembly (Acts, 1916, p. 548, above quoted). We are of opinion that both of such positions are well taken.

The special road law for Giles county (Acts, 1908, p. 611, the material portions of which are above quoted), does not expressly repeal said section 944-a so far as applicable to the taking of initial action for the establishment and location of new bridges in Giles county; and, in view of the provision of such special road statute above quoted (and especially of section 13 thereof), we are of opinion that it did not do so by necessary implication (such action of the board of supervisors not undertaking or purporting to extend to the condemnation of land for use for the location of the bridge, or for its approaches, jurisdiction over which matters is conferred on boards of supervisors by said section 944-a as the general law of the State). And we are of opinion that the latter jurisdiction was taken away from the board of supervisors of Giles county, by necessary implication, by the special road law aforesaid, and such jurisdiction was thereby conferred on the road commission of such county aforesaid.

In other words, there are a number of things needful to be done before the public is furnished with the use of a public bridge at a location where one has not before existed,

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among which are the following: (1) The determination that such a bridge should be established and its location; (2) the determination of the plans and specifications for the bridge and its approaches; (3) the location of the approaches as they recede from the bridges; (4) the acquisition or condemnation of the right of way for the bridge and its approaches; (5) the erection of the bridge and its approaches; and (6) the direction or supervision of the work of the erection of the bridge and its approaches. It appears from a comparison of the special road law for Giles county with the general statute law of the State aforesaid as to roads and bridges, that the initial determination of the matters mentioned under headings (1) and (2) and the matter mentioned under the heading (5), subject to the limitation that the "direction" or supervision,. mentioned under heading (6), must be under the road commissioner (or commissioners) in whose district the subject of it may be located, are left under the jurisdiction of the board of supervisors; whereas the matters mentioned under the headings (3) and (4) are transferred to the said road commission. By the powers given the latter, however, in the matters last referred to, such commission is, in effect, given a veto power upon the establishment and location of such bridge. When any land owner affected is summoned before the road commission "to show cause against" the road which will be occupied by the bridge, or will be needed for its approaches, "the expediency or propriety of establishing" the bridge and the location of it, is inseparably involved in the expediency and propriety of establishing the road, and the initial decision of those questions which may have been made by the board of supervisors is, in effect, again in issue before the road commission upon their undertaking to act in the further matters touching the condemnation of the right of way for the bridge and for its approaches. Thus, under such special road law, the proceed

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ings to establish such a bridge cannot be initiated before the road commission, but must be initiated before the board of supervisors. On the other hand, the board of supervisors cannot proceed further than the exercise of their initial jurisdiction aforesaid. The further steps necessary to carry such action into practical effect must be taken, if at all, before the road commission. It is before the latter that the land owners affected are summoned. Their rights are not affected by any action the board of supervisors may take in the premises favorable to the establishment of or as to the location of the bridge. They have their day in court before the road commission on those subjects, as well as upon the quantum of damages which may be allowed them by the road commission.

5. Therefore, we are of opinion that since the board of supervisors and road commission acted under legislative authority, authorizing, and, as to the former, also validating, their action in locating and establishing the bridge, together with its approaches, in question, such bridge (with its approaches), in so far as they do not physically obstruct the approaches to the ferry of appellants, did not infringe upon the property rights of appellants in said ferry, and hence will not, by its drawing away the custom in public travel from such ferry, even though it result in the total withdrawal of such custom therefrom, *take*, or *damage*, the property of appellants within the meaning of section 58 of the Constitution of Virginia.

6. There is no evidence in the cause tending to show that either of the approaches to the landings of said ferry will be in any way obstructed by said bridge or by its approaches. On the contrary, the bridge itself does not touch either of the approaches to said ferry. And as appears in detail from the above statement of the case, the approach to the bridge on the eastern side of the river, as being constructed at the time of the trial in the court below in ac-

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cordance with the only plans, which the evidence in the cause tends to show were decided upon, will not, as shown by the evidence for appellees, in any way physically obstruct the approach to the landing of said ferry on the eastern side of the river. There is no evidence for appellants tending to controvert this. Their evidence on this subject is to the effect that some prior and different plans for the approach to the bridge on the eastern side of the river were considered by the board of supervisors when its purpose was to locate the bridge at a different point on the river, (to-wit, about 272 feet below said ferry on the eastern side of the river) from that finally determined upon (to-wit, 195 feet below such ferry on the eastern side of the river): but which plans were never acted upon nor intended to be acted upon after such last named location of the bridge was decided on. Such evidence was, therefore, immaterial and could not serve to controvert the evidence for appellees on the subject.

Moreover, the extent of the contemplated works in constructing the approach to the bridge on the eastern side of the river was fixed by the action of the road commission under the special road law of Giles county aforesaid by the condition which they annexed to their establishment of the road (which condition was afterwards assented to by the board of supervisors). The extent of such contemplated works, as thus limited, fixed also the extent of the right of appellants to damages for their land so taken and for damages to the remainder of their tract of land thus partly taken, including the damages, if any, to their adjacent ferry landing on such remainder of land, which would be occasioned by any physical obstruction of the public road approach to such ferry landing. As shown by the report of the road commission made under such special road law, quoted in the above statement of the case, they refer to the location of the land taken, which extended from the exist-

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ing public road, as a new right of way, to the location of the bridge as finally decided upon, as aforesaid; and which new right of way was being condemned for the construction of the approach to the bridge at its eastern end (as well as for the abutment, pier and overhang of the eastern half of the bridge), as "a public road 30 feet in width," and state that—"It is expressly understood that the establishment of this (new) road shall not be construed to discontinue the present road to the Snidow (appellants) ferry landing, but said (present) road shall be left open so as not to interfere with the public travel to and from said ferry." The board of supervisors, when they subsequently contracted for the construction of such approach to the bridge, did so by plans and specifications which conformed to such condition annexed to their establishment of the road by the road commission.

Therefore, no question of damages to appellants by reason of any physical obstruction of the public road approach to their ferry landing on the eastern side of the river (nor indeed to the approach to their landing on the western side of the river as we shall presently see), was ever put in issue in the instant case.

Should the actual construction of the approach to the bridge physically obstruct the public road approach to either the eastern or western ferry landing of appellants and no other reasonably equally convenient public road approach or approaches thereto be provided, so as to prevent such obstruction, the proceedings in the instant cause will furnish no bar against the appellants in the future asserting in such a proceeding as may be authorized by law, their right to operate their ferry free from physical obstruction to its approaches, or to the recovery of proper damages for any injury which may be occasioned by such obstruction.

There is no evidence in the case tending to show that the

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end of the bridge on the western side of the river, or its pier, or abutment, or approach thereto, as it was finally located, about 100 feet below the landing of said ferry on that side of the river, (instead of about 154 feet below such landing as at first contemplated) would physically obstruct the approach of such ferry landing.

7. We are, therefore, of opinion that there was no error in the action of the trial court in giving the instruction complained of (quoted in the above statement of the case) which excluded from the jury any consideration of any question of damages to the ferry, or to the ferry franchise, or to the ferry rights of way; nor in the admission or exclusion of evidence on that subject.

Two other assignments of error by appellants remain for our consideration, which are not covered by what has been said above.

8. As set forth in detail in the statement of the case above, it is urged in section (b) of the grounds of appellants' demurrer to and motion to quash the original proceedings in the case that in establishing said road and in allowance of damages, the road commission had no authority to act alone as they did, and not in conjunction with the district board of road commissioners for another (Pearisburg) district of Giles county, in which the western end of the bridge, and its approach at that end, were located on the western side of New river. As to this, it is deemed sufficient to say that the application for the new road in the case before us, and which alone affected the appellants, was not "in more than one district," but wholly in the district of the road commission (appellees in this case), and hence the latter were authorized by the special road law of Giles county aforesaid to act as they did. The provision of such act relied on by appellants, which provides, in substance, that if the application aforesaid be for a new road or changing of an existing road which is "in more than one

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district," that the road commission "of any other district affected" shall also be convened by the summons to be issued by the clerk to be present at the time and place of the initial meeting of the road commission to whom such application is made, has no application, therefore, to the instant case. And even if such provision had application to the instant case, it did not affect the jurisdiction given by said special act to the road commission of Pembroke district, to whom said application was made, over appellants and the condemnation of their land located wholly in the district of such road commission, and gave only to the road commission of the Pearisburg district west of the river a right to be present at such meeting, for the denial of which right the latter only could complain.

9. What we have said above sufficiently disposes of the other grounds of appellants' demurrer to and motion to quash the proceedings in the case, except the following sole remaining position of appellants to be now considered.

It is urged that the appellants have been deprived of due process of law because they were summoned to appear before the road commission to show cause only against the road proposed to be located in accordance with the petition of John F. Williams and others (quoted in the above statement of the case) which road, as therein expressly designated, was proposed to be located about 275 to 300 feet below the ferry landing aforesaid on the eastern side of the river and was to be located so as to extend from the existing public road to the then proposed location of the eastern end of the proposed bridge and would not pass over or take any land of the appellants; and that hence appellants were given no notice by such summons to show cause against the road as subsequently located by the road commission, at an adjourned meeting thereof, at a location different from that first proposed as aforesaid and which placed it only 195 feet below said ferry landing and across a portion of the land of appellants.

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This position ignores the provisions in said special road law for Giles county, which are quoted in the above statement of the case, which practically constituted the road commission a court, with power of adjournment from time to time and from place to place, and conferred upon it the jurisdiction to disregard the route of the road proposed in the application therefor and to choose and establish a wholly different location therefor. Appellants having been duly summoned before the road commission at the time and place of their initial meeting were thereby duly made parties to all the subsequent proceedings of the road commission; were thus given their day in court; and were bound by such proceedings, under the provisions of such special road law, except as they might be relieved therefrom upon appeal taken in accordance therewith. Thus were the appellants afforded due process of law, including a trial by jury as provided for in such statute. And although it may have been true in the instant case that the appellants did not have *actual* but only *constructive notice* of the change in the location of the road aforesaid made by the road commission at their adjourned meeting at the time of such action; and not only was that sufficient, but the appellants soon afterwards also had *actual notice* of such action of the road commission, and appealed therefrom to the circuit court; and appellants had a trial *de novo* on such appeal, which gave them due process of law in the court below upon the trial there of all the issues in the case. So that in no aspect of the case do we feel that there is any merit in the position of appellants which we have now under consideration.

Upon the whole, therefore, we find no error in the judgment complained of and it will be affirmed.

Affirmed.

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Staunton.

UNION TANNING COMPANY v. COMMONWEALTH.

September 19, 1918.

1. TAXATION—*Foreign Corporations—Capital.*—The omitted capital of a foreign corporation employed in business in Virginia as of February 1, 1908, to 1915, inclusive, was legally assessable for taxation in Giles county in 1916, where it appeared that it maintained a place of business in Giles county, and in its return taxes for 1916 listed all of its capital stock employed in business in Virginia as assessable for taxation at Narrows in Giles county, although the company was engaged in business at three places in Virginia and there was no express proof as to in which of these places the principal office of the company was located.
2. TAXATION—*Omitted Property—Foreign Corporations—Capital.*—The capital of a foreign corporation doing business in Virginia is intangible personal property and as such has been assessable and taxable in Virginia since long prior to 1908, under the statute law of Virginia.
3. TAXATION — *Foreign Corporations — Capital — Situs.*—The legal *situs* of intangible personal property—*i. e.*, the capital—of corporations, both foreign and domestic, taxable in this State, for the years 1908 to 1916, inclusive, in question, was and is fixed for current yearly assesments, by section 492 of the Code of 1904, which provides that the intangible personal property not otherwise taxed of *all* corporations "shall be listed to the corporation by the principal accounting officer and *at the principal place of business* of the corporation * * *"
4. TAXATION—*Foreign Corporations—Business Domicile—Principal Place of Business.*—The words *principal place of business* in Code of 1904, section 492, providing that the intangible personal property not otherwise taxed of *all* corporations shall be listed to the corporation *at the principal place of business* of the corporation, and the words *business domicile*, used in Acts 1916, page 660, in designation of the *situs* of intangible personal property of foreign corporations for assessment for taxation have the same meaning and there is no conflict between the statutes.

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5. TAXATION—*Intangible Personal Property—Situs.*—It is only in the absence of statute on the subject that the rule with respect to the *situs* of intangible personal property following the domicile of its owner applies. The legislature has plenary power to provide that such property of a non-resident corporation (and of non-resident natural persons) shall be assessable for taxation at any place or places it may designate, regardless of the true domicile of the corporation or person taxed. By such designation it makes such place or places the quasi-domicile—*i. e.*, the domicile for purposes of taxation in this State—of such corporations or natural persons. It gives to such quasi-domicile the same effect *quoad* purposes of taxation as if it were the true domicile.

6. FOREIGN CORPORATIONS—*Domicile—Principal Place of Business.*—A foreign corporation doing business at more than one place in the State has the option to make a *bona fide* choice, *ante motam litem*, of any one of such places, as its principal place of business in this State, just as a natural person with more than one place of residence has the option to make any one of them his domicile. Equally, the *locus* of the domicile (quasi-domicile in the former and actual domicile in the latter case) is a matter of act and intention. Both must concur to fix the domicile.

7. FOREIGN CORPORATIONS—*Domicile—Principal Place of Business—Intention of Corporation.*—Given the existence of the actual doing of business by a foreign corporation at a particular place in the State, its intention or *animus*, on the subject is decisive. If it so intends, that intention, together with the concurrent existence of the actual doing of such business at such place, is decisive, and fixes that place as the principal place of business of the corporation in this State.

8. FOREIGN CORPORATIONS—*Domicile—Principal Place of Business—Intention of Corporation.*—If there is a statute prescribing how the intention of a foreign corporation to fix its principal place of business at a certain place shall be manifested, the statute is conclusive on the point, but section 1104, Code of 1904, requiring foreign corporations to have an office in the State at which claims may be audited, settled and paid, and to designate an agent upon whom process may be served, does not require a foreign corporation to set forth where its principal office in this State is located.

9. FOREIGN CORPORATIONS—*Domicile—Principal Place of Business—Intention of Corporation.*—As in this State a foreign corporation is not required by statute to declare where it intends its principal place of business to be, the courts must ascertain whether such intention exists or existed at any particular time

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or as to any particular place by evidence, which may be furnished by facts and circumstances touching the action of the corporation which may disclose the existence of such intention. The courts have often the same duty to perform in deciding upon the domicile of natural persons. No advance declaration on the subject has as yet been required of them by statute.

10. FOREIGN CORPORATIONS—*Domicile—Principal Place of Business—Intention of Corporation—Case at Bar.*—The fact that in the instant case the company made its return in 1916 in Giles county for the taxation at Narrows in such county, of all of its capital employed in business in Virginia, outside of that county as well as within it, was equivalent to a declaration by it that its intention or *animus* was that Narrows in such county was, as of February 1, 1916, the *situs* for taxation of all of such capital, and in the absence of any evidence that such intention was one newly formed by the company, the inference is warranted that such intention was not newly formed in 1916, but existed in former years, and that Narrows in Giles county was for such years, as well as 1916, the principal place of business or business domicile of the company, and the legal *situs* of all its capital for taxation in this State.

11. TAXATION — *Erroneous Assessment — Correction — Burden of Proof.*—The burden of proof is upon an applicant for the correction of an alleged erroneous assessment of taxes under Code of 1904, section 568. After the making of the assessment and the jurisdiction of the assessing officer who made it has been proved, the burden is not on the State or local subdivision to show by affirmative proof the existence of the specific items embraced in the assessment and the fair cash value thereof.

12. TAXATION—*Assessment—Officers Act Judicially.*—Assessing officers act judicially in deciding when property is taxable and in placing a value upon it, but unlike regular judicial tribunals they are not confined to the consideration only of matters established before them in accordance with the general rules of evidence. They act and are required by statute, indeed, to act upon their own knowledge, or upon any means of information they may have, that is, upon their own opinion based upon such information as they may have; and although it is their duty to receive and they should not arbitrarily disregard the lists of the returns and statements of property owners, they are not bound thereby.

13. TAXATION—*Assessment—Inquisitorial Powers of Assessors—Presumption in Favor of Assessment.*—Though assessing officers have many inquisitorial powers of a drastic nature, under the statute law of Virginia, they are not required to exhaust

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all of those powers before they can make an assessment. If the *situs* of the subject of the tax is within the jurisdiction of the assessing officer, he has jurisdiction to make the assessment, and the assessment is presumed to be legal and valid in all respects, until the contrary is affirmatively shown. In such case, so far as the ascertainment of the subject of the assessment and its value is concerned, the assessing officer is required only to act in good faith in forming his opinion upon such information as he may have to go upon, however meagre.

14. TAXATION—*Erroneous Assessment—Submission to Jurisdiction of Court.*—An applicant to a court for the correction of an alleged erroneous assessment of taxes against him, submits himself to an equitable jurisdiction which the court exercises in such cases to ascertain and impose upon him an assessment of all the taxes with which he is assessable in the jurisdiction of the taxing power drawn in question.

15. TAXATION—*Erroneous Assessment—Issue Before Court.*—The issue tendered by an application for the correction of an alleged erroneous assessment of taxes is not the narrow one of whether this or that item of the assessment is illegal or erroneous; but whether the taxpayer seeking relief has been assessed with more property or at a greater valuation than is legally assessable against him in the jurisdiction involved. Only by making a full disclosure of all his property in question assessable in such jurisdiction and the appearance from such proof that the assessment as a whole is illegal or erroneous, can the applicant overturn the whole assessment. This is true of cases involving current assessments, as well as of assessments of omitted taxes.

16. TAXATION—*Omitted Taxes—Erroneous Assessment—Burden of Proof—Acts 1916, page 826, paragraph 7—Retroactive Statute.*—The statute on the subject of omitted taxes, which was in force when the assessment complained of in the instant case was made in 1916 (Acts 1916, page 826, paragraph 7), provides that in contested cases the burden of proof shall be upon the taxpayer to show that he has made a full disclosure. The omitted taxes were for the years 1908 to 1915. Under this statute the assessment complained of was made, and the case arose after the statute was in force.

Held: That this statute applied to the instant case.

17. TAXATION—*Erroneous Assessment—Full Disclosure by Applicant.*—In the instant case the company did not make a full disclosure of its capital assessable for taxation in Giles county, and failed to show by its evidence introduced in the trial court, nor did it otherwise appear from any evidence therein, that any items of the assessment complained of were illegal or erroneous in any particular. Therefore, there was no evidence in the

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instant case to rebut the *prima facie* case made by the assessment complained of, as to the whole or as to any of the items of assessment therein made. Hence, the mere absence of further proof on behalf of the defendants can avail the said company nothing.

18. TAXATION—*Omitted Taxes—Evidence Before Examiner of Records.*—The fact that the examiner of records had no evidence before him at the time he made the assessment, in question, of the exact total amount of the omitted capital to be assessed or of the specific items of it, or of what proportions of it were being employed at the several places of business of the company in the State of Virginia, but arrived at the amounts he assessed merely from the opinion he entertained that the company employed in its business during the preceding years in question no less amount of capital than it returned for taxation in 1916, and from a comparison of the assessments made against said company in Giles county for the preceding years in question with its return for taxation made by it in 1916, did not invalidate the assessment.

19. TAXATION—*Due Process of Law—Property Valued Higher than Other Like Property.*—A systematic, intentional discrimination, by those administering the tax system of a State (whether as directed by statute or contrary to statute), against a person, by an assessment, of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, is a denial to such person of due process of law and the equal protection of the laws guaranteed to him by the State and federal Constitution.

20. TAXATION—*Due Process of Law—Property Valued Higher than Other Like Property.*—But where there has been no discrimination between persons or classes of persons, but the property of the like kind of all persons in a given jurisdiction has been under-valued in its assessment for taxation contrary to law, a correction made of such assessment of any individual property owner according to law, is not a violation of the constitutional provisions as to due process of law or the equal protection of the laws, and evidence in a proceeding to correct an erroneous assessment that the property was assessed on a higher scale of valuation than other like property was properly excluded.

21. TAXATION—*Omitted Taxes—Correction of Assessment—Code of 1904, section 508, Amended by Acts 1916, page 826, paragraph 7.*—Code of 1904, section 508, amended by Acts 1916, page 826, paragraph 7, which provides that where the taxpayer has made a full disclosure of his taxable property, an assessment made

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in good faith, although under a misapprehension of the law, shall be final as to valuation, has no application to a corporation which failed to make a full disclosure of its taxable property.

22. TAXATION—*Omitted Taxes—Interest.*—The assessment of omitted taxes in the case at bar having been made when act of 1916, page 826, was in force, which contained no provision giving discretionary powers to the assessing officer, or to the court, on the subject of interest (the omitted property not having been voluntarily reported for taxation on or before August 1, 1916, as provided for in section 3 of such statute), as did section 508 of the Code of 1904 as it at one time existed prior to its amendment by the enactment in 1916, the taxes in question must bear interest.

Error to a judgment of the Circuit Court of Giles county, on a motion to correct an erroneous assessment. Judgment for the Commonwealth. Plaintiff assigns error.

Affirmed.

This is a proceeding which originated in the court below upon the application of the plaintiff in error, the Union Tanning Company (hereinafter referred to as "company"), under the statute in Virginia (sections 567, 568, Code), for relief from an assessment for taxation made on November 11, 1916, by the examiner of records of the district including Giles county, of omitted capital of said company for the years 1908 to 1915, inclusive, and interest thereon.

There were certain pleadings in writing (which although unnecessary in a proceeding under said statute were permissible), and certain action of the court below thereon, not necessary to set forth in detail here, after which certain testimony was heard by the trial court, *ore tenus,* introduced in behalf of the defendants and the said company, respectively. Whereupon, as is certified in the record,—

"* * the court upon consideration of the pleadings and the evidence was of opinion and so decided,—

"First. That the intangible personal property of the said Union Tanning Company, a corporation, referred to in the said petition is assessable in Giles county; and

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"Second. That the fact that it may have been assessed at the same proportion of its value as that of property of the same class belonging to other citizens of Giles county for the years 1908 to and including the year 1915 is not material; and

"Third. That the court is of the opinion that the said Union Tanning Company did not make a full disclosure for the years named; and

"The petition was dismissed, the relief prayed for was refused and a judgment entered against the plaintiff for the cost, to which judgment and decision of the court the plaintiff then and there excepted."

The said company brings error.

THE MATERIAL FACTS.

The said company is a foreign corporation, chartered and organized under the laws of the State of New Jersey and was engaged in business in the State of Virginia on the 1st of February of the years 1908 to 1916 inclusive. The business of the company was that of tanning leather, *i. e.*, manufacturing leather from hides by certain processes in which bark from the wood of certain kinds of trees was used.

The company was engaged in such business during said time at three places in the State of Virginia, namely, at Narrows, in Giles county, at ....., in Wise county, and at Iron Gate, in Alleghany county.

There is no express proof in the case as to what place in Virginia was the principal office of the company on February first of the years 1908 to 1915, inclusive, or on February 1, 1916.

The assessment aforesaid, made in 1916 in Giles county, by the examiner of records, was based on the capital of said company employed in business in the State of Virginia on February 1, 1916, according to its return for taxation for

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that year, furnished by said company itself to a commissioner of revenue for Giles county for the district therein in which Narrows is located, at which place of business of such company is and has been located from February 1, 1908, to February 1, 1916, inclusive. Such return consisted of the answers of the company to interrogatories and the list of such capital therein furnished such commissioner of the revenue as required by law. Such capital, so listed by the company itself for taxation at the place of business of the said company at Narrows, in Giles county, as of February 1, 1916, for that year, consisted, not only of hides and bark located in Giles county on February 1, 1916, held for use in said business in such county, but also of intangible personal property (classed as capital under the statute law of Virginia) of the company employed in business outside of the county of Giles, elsewhere in the State of Virginia.

As the said company by its said return for the year 1916 listed all of its capital stock employed in business in Virginia as of the first of February of that year as assessable for taxation at Narrows in Giles county, the examiner of records assumed that that was the legal *situs* for the assessment for taxation of all of such capital for the preceding years 1908 to 1915, inclusive. Further, the examiner of records was of opinion that the total amount of the capital of said company employed in business in Virginia as of February first of the years 1908 to 1915, inclusive, was as much as was so employed on February 1, 1916, and hence compared the assessments which had been made against such company in Giles county for the years 1908 to 1915, inclusive, with its said return for assessment for the year 1916. In that comparison the examiner of records found that for the year 1908 said company was assessed in Giles county with a certain amount of "capital;" that for the years 1909 to 1915, inclusive, and respectively, it was assessed in such county with certain personal property as tangible personal

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property which consisted of hides and bark used in the business of the company, which was in truth "capital" of the company; but comparing such assessments with the return aforesaid of the company of its capital for taxation for 1916, the examiner of records found that the company had been assessed in Giles county for the years 1908 to 1912, inclusive, with approximately $120,000 less property for each of such years (classed in 1908, and which should have been classed for the other of such years, as capital), than it returned for taxation in such county as capital in 1916 as aforesaid; and with approximately $130,000 less, for each of the years 1913, 1914 and 1915, of property which should have been classed as capital, than it returned for taxation as aforesaid in 1916. Accordingly, upon his opinion and assumption aforesaid, and without other evidence before him than that above mentioned, the examiner of records made the assessment aforesaid for the year 1916 of $130,000 for each of the years 1913 to 1915, inclusive, and $120,000 for each of the years 1908 to 1912, inclusive, as omitted capital of said company which should have been, but had not been, taxed by the State of Virginia or Giles county for those years.

It does not appear from the record, affirmatively or negatively, whether the said company made any returns or listed its capital, or any of it, employed in business in the State of Virginia elsewhere than in Giles county for any of the years aforesaid, or what was the full cash value of all the capital of said company legally assessable in Giles county, except as shown by the assessment complained of.

It does not appear from the record that the company made any return or listed any capital for taxation in Giles county for the year 1908; but it was assessed for 1908 in such county with "capital" employed in business in Virginia. The parol proof in this case shows that this consisted solely of certain hides and bark on hand and held by the company

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on February 1, 1908, in Giles county for use in its business in such county; that such property was assessed at about $6,600 less than the cost of the hides and bark; and that no other raw materials on hand for use, or other capital of the company employed in the business of the company elsewhere in the State as of February 1, 1908, was assessed against it in Giles county for the year 1908.

It does appear that for the years 1909 to 1915, inclusive and respectively, the company did make its returns for assessment for taxation in Giles county. Such returns did not list any capital of the company for assessment as such, except for the year 1909, as hereinafter set forth. It appears from the evidence, however, that it understood at the time that its hides and bark on hand on February first of those years for use in its business was in truth capital and subject to taxation as such. But, as the aggregate tax rate of the State and county for those years was the same on tangible personal property as on the capital of such a company employed in its business in the State, at the suggestion of the commissioners of the revenue before whom such returns were made, the company listed, *as it claimed,* all of the hides and bark it had on hand in Giles county on February first of such years, respectively, for use in its business there for assessment for taxation as tangible personal property, the number of hides or the number of pounds of the bark, however, not being listed only the aggregate value of the bark being listed under item 9 of the interrogatories, the form of which (so far as material) was as follows:

"9. All felled timber, railroad ties, telegraph, telephone or electric light poles, piles, mine props, cord wood, hoop poles, staves and bark * * * of the fair cash value of * * *" (the word "bark" being written at the end of the printed language of the interrogatory for some years, and "bark and hides" in two instances); and such value of the hides for such years being listed under item 21 of the inter-

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rogatories, the form of which, so far as material, was as follows:

"21. All other tangible personal property * * * not specifically enumerated in this or other schedules and not exempt from taxation, of the fair cash value of * * *;" without anything being added to the printed language of the interrogatory, except that for the year 1909 the word "hides" was written at the end of this printed interrogatory with the aggregate of the fair cash value of the hides for that year first inserted there, but then erased and inserted below under item 3, the form of which is as follows:

"3. The value of all capital of incorporated joint stock companies not otherwise taxed * * *."

That the items mentioned in the next above paragraph were most of them inserted in said returns by the commissioner of the revenue aforesaid, at the office of the said company at Narrows; that as a rule the "amount and value of the bark and hides" aforesaid were read to the commissioner of the revenue, at the time of the preparation of such returns, from the books of the company at Narrows, by employees of the company in charge of such books, and the figures of the aggregate values aforesaid were inserted in the returns, as aforesaid, by the commissioner of the revenue.

That no other capital of the said company employed in business in Virginia was listed in said returns for the years 1909 to 1915, inclusive, except said hides and barks in Giles county as aforesaid.

The testimony for the company is to the effect, "that there was no other property of any kind whatsoever there owned" (in Giles county) "by the Union Tanning Company for any of those years" (1908 to 1915, inclusive) "subject to taxation" (except certain tangible property about which there is no issue in this case); "that the finished product of the tannery was not kept at Narrows, nor sold from there, but

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was shipped to Elizabeth, N. J., and other places north, where it was cut and marketed; that there was no bonds, notes, bills or accounts receivable at Narrows; that they did some business through the Iron Gate office; that there was twice as much bark, at greatly increased cost" (in Giles county) "in 1916, as there had been on the first day of February of any previous years; that there was a much larger amount of hides" (in Giles county) "at greatly increased price, more than twice as high, on account of the war * * *"

The testimony for the defendants disclosed, however, that the books of the company, for the years 1908 to 1915, inclusive, showed the number of hides and the number of pounds of bark it had on hand at Narrows, in Giles county, on February first of such years, and the cost prices thereof; and that the fair cash value thereof, if computed at the cost prices, exceeded, by many thousands of dollars, the respective valuation at which they were assessed for those years and the valuations at which they were returned by the company for assessment for the years 1909 to 1915, inclusive; though such discrepancies in valuation were not sufficient to make up the entire valuations of omitted capital assessed in 1916, as aforesaid. And the defendants introduced no evidence expressly showing that other capital of the company made up the residue of such valuations of the 1916 assessment.

The further facts to be considered in connection with the question of the location of the principal place of business or business domicile of said company in Virginia are the following:

The said company filed its power of attorney dated September 6, 1910, with the State Corporation Commission soon after that date, in pursuance of section 1104 of the Code of Virginia, as amended (see Pollard's Code, 1904, sec. 1104) and in subsequent years filed similar powers of attorney in which it made the following statements, to-wit:

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"* * * having established *an* office in the State of Virginia, the same *to be* located at Iron Gate in said State, and desiring to transact business in the State of Virginia in conformity with the laws thereof;" and by such powers of attorney it constituted and appointed certain persons resident of Virginia and residing at Iron Gate, succeeding each other from time to time during the period following September 6, 1910, as agents and attorneys for such company for the State of Virginia, "upon whom all legal process against said company may (might) be served." (Italics supplied).

Prior to September 6, 1910, during the years 1908 to 1910, inclusive, and as of the first of February of such years, the said company had appointed by power of attorney alike filed and had its statutory agent upon whom all legal process against the company might be served, but such agent resided at Cadet in Wise county, Va.

The only evidence in the record as to the business done by the company at Iron Gate is that "It did some business through the Iron Gate office" (above quoted), and the fact, aforesaid, that this was one of the three places of business of the company in Virginia.

The court below refused to permit the said company to introduce certain testimony to the effect that there was a general under-assessment of all intangible personal property, (as well as of tangible personal property) in Giles county for taxation for the years 1908 to 1915, inclusive, below its fair cash value, and that the same under-assessment was made of the intangible personal property of said company assessed for taxation in Giles county for such years.

The case seems to have been tried in the court below upon the assumption that the assessment of omitted capital complained of, in so far as it embraced a part of such capital assessed and taxed in Giles county for the years 1908 to 1915, inclusive, was at a higher percentage of its fair cash

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value than the current yearly assessment as made for those years, hence we may regard that as a fact in the case.

W. B. Snidow, for the plaintiff in error.

Jno. R. Saunders, Attorney-General, and *J. D. Hank, Jr., Assistant Attorney-General,* for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error, upon the points saved in the proceedings in the court below, raise the following questions for our consideration, which will be disposed of in their order as stated below.

1. Was the omitted capital of the Union Tanning Company, employed in business in Virginia, as of February 1, 1908 to 1915, inclusive, legally assessable for taxation in Giles county in 1916?

This subject is wholly regulated by statute.

That such capital of a foreign corporation doing business in Virginia (as was true of the said company), is intangible personal property and as such has been assessable and taxable in Virginia since long prior to 1908, under the statute law of Virginia, is well settled. *Commonwealth* v. *United Cigarette Machine Co.,* 119 Va. 447, 455, 89 S. E. 935. The question of the *situs* of such property, of a foreign corporation doing business in this State at more than one place, for the purpose of its assessment for taxation in Virginia, has not heretofore, however, been presented to this court for decision, and it must be decided by the application of the statute law on the subject to the facts of the case. The latter question was not involved in the case last cited, and that decision did not pass directly upon such question.

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The legal *situs* of intangible personal property—*i. e.*, the capital—of corporations, both foreign and domestic, taxable in this State, for all of the years in question, was and is fixed for current yearly assessments, by section 492 of the Code of Virginia, which provides that the intangible personal property not otherwise taxed of *all* corporations "shall be listed to the corporation by the principal accounting officer and *at the principal place of business of* the corporation * *" (Italics supplied). Va. Code, 1904, sec. 492. This statute has not been amended or changed in its phraseology, and, hence, was in force and fixed the *situs* for its assessment for taxation of all the capital of said company employed in business in this State on the first day of February for the years 1908 to 1916, inclusive, and was in force when the assessment complained of in the instant case was made.

The Acts of 1916, p. 655, at p. 660, having reference in the language presently to be quoted, not to domestic corporations, but to foreign corporations only, doing business in this State, uses the following language with regard to the *situs* of the intangible personal property—*i. e.*, the capital—of such corporations employed in business in this State, for current yearly assessments, namely, that such property or capital is "* * hereby declared assessable within this State and at the *business domicile* of said nonresident * * corporation * * or its agent or representative." (Italics supplied). This act was also in force when the assessment complained of in this case was made.

The Acts of 1916, at pp. 827-8, containing section 508 of the Code, as amended, on the subject of the assessment of "omitted taxes, levies, etc.," so far as material to the point under consideration, provides as follows: "* * the examiner of records * * (is) * * hereby authorized, unless the assessment on intangible personal property * * for omitted taxes have (has) already been made, to

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use the same methods * * for the assessment * * of all omitted taxes on intangible personal property * * as are authorized to be used for the assessment * * of current taxes * *" This act was also in force when, and it was under it that, the assessment complained of in the instant case was made.

Where, then, was the *principal place of business* or *business domicile* of said company in this State when the assessment of omitted capital complained of was made in 1916?

The company contends that the law will imply that its principal place of business in this State was at the place where its principal office in this State was located at the time in question; and the case of *Lloyd* v. *Lynchburg,* 113 Va. 627, 75 S. E. 233, is relied on to sustain that position.

That case involved a domestic corporation and, in construing said section 492 of the Code, held that the law will imply that the principal place of business of such corporation is at the place where its principal office is located. It is true that that holding resulted from the consideration that the domicile of a domestic corporation is, as a general rule, at the place where its principal office is located; and from the further consideration that, independently of statute, the intangible assets of a corporation—as of a natural person—having no *situs* of their own for purposes of taxation, follow and are assessable only at the domicile of the owner. Hence, that case is not directly decisive of the point that the same holding must be made with respect to the *locus* in this State of the principal place of business of a foreign corporation; for, accurately speaking, a foreign corporation can have but one domicile, as is true of a natural person, and it can have but one principal office, which is identical with its domicile, if it has such an office at all, and that, if it exists, must be located within the jurisdiction of the sovereign which created it. If a corporation or

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natural person has its domicile in this State, it is not a non-resident, but a resident of this State. Therefore, a foreign corporation cannot have its true domicile or its principal office, in the sense that it is its true domicile, in this State. It is because its domicile is not in this State that it is a foreign corporation. However, while all this is true, nevertheless, since it is settled, as above stated, that the capital of a foreign corporation employed in business in Virginia is taxable in this State, and since section 492 of the Code fixes the *situs* of such capital for the purpose of its assessment for such taxation, it is manifest that the language, "the principal place of business," in said section 492, when applied to a foreign corporation, has reference to its principal place of business in this State, and where, for purposes of taxation, it will be considered as domesticated and to have a local habitation. That this is a correct construction of said section 492 becomes plain in view of the phraseology, "business domicile," used in the later statute (Acts, 1916, p. 655, at p. 660, above quoted) in designation of the *situs* of intangible personal property of foreign corporations for assessment for taxation. Both of such statutes are still in force. There is no conflict between them. They both mean one and the same thing when applied to foreign corporations.

That is to say, the whole subject is statutory if there is statute law governing the subject. It is only in the absence of statute on the subject that the rule with respect to the *situs* of intangible personal property following the domicile of its owner applies. The legislature has plenary power to provide that such property of a non-resident corporation (and of non-resident natural persons) shall be assessable for taxation at any place or places it may designate, regardless of the true domicile of the corporation or person taxed. By such designation it makes such place or places the quasi-domicile—*i. e.*, the domicile for purposes of taxation in this State—of such corporations or natural persons.

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It gives to such quasi-domicile the same effect *quoad* purposes of taxation as if it were the true domicile.

Such being the effect of the statute, it follows, therefore, that, while not directly in point, the principle involved in the decision of *Floyd* v. *Lynchburg, supra,* would lead to the holding that the law will imply that the principal place of business of a foreign corporation doing business in this State is at the place where its principal office in this State is located. But if this be true, the question still remains—

Where was the principal office of the said company in Virginia located at the time the assessment complained of was made in 1916; and where in 1908 to 1915, inclusive?

We think there can be no doubt that a foreign corporation doing business at more than one place in the State has the option to make a *bona fide* choice, *ante motam litem,* of any one of such places, as its principal place of business in this State, just as a natural person with more than one place of residence has the option to make any one of them his domicile. Equally, the *locus* of the domicile (quasi-domicile in the former and actual domicile in the latter case) is a matter of act and intention. Both must concur to fix the domicile. But given the existence of the actual doing of business by a foreign corporation at a particular place in the State, its intention or *animus* on the subject is decisive. If it so intends, that intention, together with the concurrent existence of the actual doing of such business at such place, is decisive, and fixes that place as the principal place of business of the corporation in this State. And the same is true of the location of the principal office or business domicile in this State of a foreign corporation doing business therein, if it be regarded as domesticated for purposes of taxation in this State.

But how must the existence of such intention be manifested?

Independent of statute, it may be manifested in any of

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the innumerable ways or forms which the action of incorporated companies may take.

If there is a statute prescribing how such intention shall be manifested, that of course, would be conclusive on the point.

The said company relies on section 1104 of the Code, (as given in Pollard's Code of Va., 1904) and its action in appointing its statutory agents, residing at Iron Gate (one of the places of business in this State of said company), under such statute, and the statements in the power of attorney, making such appointments from time to time, to-wit: "* * having established *an* office at Iron Gate * *" (italics supplied), as conclusive of the fact that said company, prior to the assessment of omitted capital aforesaid in 1916, had the intention that its *principal office* should be and was located at Iron Gate, and, hence, not at Narrows, in Giles county.

Said section 1104, so far as material, is as follows:

"Every incorporated company doing business in this State shall have an office in the State at which all claims against such company due residents of the State may be audited, settled and paid. Every such company * * * shall before doing business in this State, present to the State Corporation Commission * * a written power of attorney * * appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served * *"

Such statute might have provided that the power of attorney therein mentioned should, or that a foreign corporation doing business in this State should in some other manner, set forth where its principal office in this State is to be located (as sec. 1105a, subsec. 2, cl. b, as given in Pollard's Code of Virginia, 1904, requires shall be stated in certificates of incorporation of domestic corporations), or where it is located; but it does not. It is silent on that sub-

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ject. The office referred to in said section 1104 is an office for auditing and paying certain claims. Such an office need not be the principal office of the corporation. And as to the place of residence of said statutory agent on whom all legal process against the corporation may be served, that need not be the same as of the principal office of the corporation. There is no statute making the location of such claim auditing and paying office, or of the residence of such statutory agent, inseparable from the location of the principal office of the corporation. In the absence of such statutory requirement, the option and power of a foreign corporation doing business in this State at more than one place, to separate its business and yet choose one of such places as its principal office or principal place of business in the State, independently of the location of its claim auditing and paying office, or the residence of its statutory agents aforesaid, exists unrestricted.

It is important, it is true, for purposes of taxation, that the *situs* of the intangible personal property, or capital of foreign corporations employed in business in this State should be definitely fixed or be capable of being definitely fixed, so far as the *animus* or intention of the corporation is involved as an element of fact as aforesaid—as, for example, would be afforded by a statutory requirement that a declaration of such intention should be made by the corporation in some form and in some manner made to appear of record in advance of the yearly assessments for taxation. The State and the cities, towns and counties thereof are interested in such advance declaration being made and evidence of it being thus furnished. But the courts are powerless to supply such a requirement. The appeal therefor must be made to the legislative branch of the government. In the absence of action in this regard by that department of government, the courts must content themselves with ascertaining whether the element of intention

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under consideration exists or existed at any particular time. or as to any particular place, by evidence which may be furnished by facts and circumstances touching the action of the corporation which may disclose the existence of such intention. The courts have often the same duty to perform in deciding upon the domicile of natural persons. No advance declaration on the subject has as yet been required of them by statute.

In the instant case, as aforesaid, we have not any express declaration of the said company, *ante motam litem*, of the place of location of its *principal office* in this State, to thereby conclude the question of the whereabouts of the location of its principal place of business or business domicile, *i. e.*, the *situs* of its aforesaid property or capital for taxation in this State. We must look to the evidence of other acts of the said company, therefore, for evidence of its *animus* in this particular.

Where the *animus* above referred to, however, is once ascertained to exist as to any particular time in connection with any existing place of business of said company, it is as conclusive of the whereabouts of the location of its principal place of business or business domicile, as of that time, as if such location were established by its designation of its *principal office* under statutory requirements.

The facts in this particular case, as shown by the record, which could in any aspect of it be deemed material, are set forth in the statement of the facts above and need not be here repeated. It is deemed sufficient here to say that we are of opinion that the single fact that the said company made its return in 1916 in Giles county for the taxation at Narrows in such county, of all of its capital employed in business in Virginia, outside of that county as well as within it, was equivalent to a declaration by it that its intention or *animus* was that Narrows in such county was, as of February 1, 1916, the *situs* for taxation of all of such

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capital. In the absence of any evidence that such intention was one newly formed by said company—such as that for any former year it had returned such capital for taxation at one of its other places of business, or elsewhere in Virginia, or that there had been any material change in its business, or other evidence tending to show that at some prior time it had a different intention with respect to the location of its principal place of business, or business domicile, or the *situs* of such capital for taxation (and there is an entire absence of any such evidence in the record), we are of opinion that the court below was warranted in drawing the inference that such intention was not one newly formed in 1916, but had existed in former years, when the like character of business done by said company as in 1916 at Narrows was conducted by it there, to-wit, as of the 1st day of February, 1908 to 1915, inclusive, and that Narrows, in Giles county, was for such years, as well as for 1916, the principal place of business or business domicile of said company, and the legal *situs* of all of said capital for taxation in this State.

Hence we are of opinion that the omitted capital of said company employed in business in Virginia, as of February 1, 1908 to 1915, inclusive, was legally assessable for taxation for those years in Giles county in 1916.

2. After the making of the assessment and the jurisdiction of the assessing officer who made it have been proved, in a proceeding such as that before us, instituted by a taxpayer for relief from an alleged erroneous assessment, has the burden of proof, upon the State or local subdivision thereof which has attempted to exercise the taxing power, to sustain the assessment, been *prima facie* borne; or must it go further and sustain such burden by affirmative proof of the existence of the specific items embraced in the assessment and the fair cash value thereof; and if that additional proof is not produced, must the assessment *pro tanto*, be held to be illegal or erroneous?

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We are of opinion that this question must be answered in the negative.

The statute (sec. 568 of the Code), being one of the sections of the statute under which the proceeding in the instant case was instituted, provides: "* * * if the court is satisfied that the applicant has been erroneously assessed with any taxes * * the court may order that the assessment be corrected."

Moreover, assessing officers act judicially in deciding when property is taxable and in placing a value upon it, but unlike regular judicial tribunals they are not confined to the consideration only of matters established before them in accordance with the general rules of evidence.

They act and are required by statute, indeed, to act upon their own knowledge, or upon any means of information they may have, that is, upon their own opinion based upon such information as they may have; and although it is their duty to receive and they should not arbitrarily disregard the lists of the returns and statements of property owners, they are not bound thereby. 1 Desty on Taxation, (1884 ed.), p. 541. And though they have many inquisitorial powers of a drastic nature, under the statute law of Virginia, they are not required to exhaust all of those powers before they can make an assessment. If the *situs* of the subject of the tax is within the jurisdiction of the assessing officer, he has jurisdiction to make the assessment, and the assessment is presumed to be legal and valid in all respects, until the contrary is affirmatively shown. 2 Desty on Taxation, p. 615; 37 Cyc. 990, 1251. In such case, so far as the ascertainment of the subject of the assessment and its value is concerned, the assessing officer is required only to act in good faith in forming his opinion upon such information as he may have to go upon, however meagre. Action in good faith is the only essential requirement under such circumstances. Desty on Taxation, p. 493. Errors of judg-

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ment, mistakes of fact in making, or even that an assessment is made contrary to the evidence, do not vitiate the *prima facie* validity of the assessment. 2 Desty on Taxation, pp. 611-614. Like the judgment of a court having jurisdiction of the subject matter and of the parties, the determination of an assessing officer, evidenced by his return of his assessment in due form, of property having its *situs* for taxation in his territory, is *prima facie* correct and valid in all respects.

Hence, in a proceeding, such as that before us, should the proof in the case show that a particular item or items of the property assessed is erroneous or illegal, as to the quantity or value of the property assessed, or otherwise, that will entitle the applicant to the correction of the assessment in that or those particulars, but no farther. The taxing power rests secure upon the presumption aforesaid that the assessment is correct in all other particulars, until the contrary is shown in evidence.

That is to say, an applicant to the court for the correction of an alleged erroneous assessment of taxes against him, submits himself to an equitable jurisdiction which the court exercises in such cases to ascertain and impose upon him an assessment of all the taxes with which he is assessable in the jurisdiction of the taxing power drawn in question. (*Commonwealth* v. *Schmelz*, 114 Va. 364, 76 S. E. 905.) The issue tendered by such an application and made before the court is not the narrow one of whether this or that item of the assessment is illegal or erroneous; but whether the taxpayer seeking relief has been assessed with more property or at a greater valuation than is legally assessable against him in the jurisdiction involved. Where an assessment, such as aforesaid, is introduced in evidence in such a proceeding, it establishes in proof a *prima facie* case for the taxing power upon the whole issue. Hence, in the very nature of the case and of the issue before the

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court, the applicant cannot overturn the effect of such *prima facie* proof beyond the items which may be reached by his proof. The items of the assessment not touched by his proof remain established in evidence by the assessment. The result is that, practically, only by making a full disclosure of all his property in question assessable in such jurisdiction and the appearance from such proof that the assessment as a whole is illegal or erroneous, can such applicant overturn the whole assessment.

This is true of cases involving current assessments, as well as of assessments of omitted taxes. In both cases the evidence to overturn the *prima facie* case made for the taxing power by the assessment is peculiarly within the power of the taxpayer to produce, if the presumption arising from the *prima facie* case made be not correct. Hence, in the absence of the production of such proof by the taxpayer, such presumption becomes conclusive, in accordance with a well settled rule of evidence. 1 Wigmore on Ev., sec. 285, and authorities cited.

But, further, as to the burden of proof resting upon the applicant to the court for relief from omitted taxes (such as is the case before us): The statute on the subject of omitted taxes, which was in force when the assessment complained of in the instant case was made in 1916 (Acts 1916, p. 826, par. 7, which will be hereinafter more fully quoted), so far as material to the point now under consideration, provides that "* * in contested cases" (such as is the case before us) "the burden of proof shall be upon the taxpayer to show that he has made a full disclosure."

The said company contends that this statute does not apply to the instant case, and that to hold that it does so would be to give it a retroactive effect; but we do not think that such position is well taken. It was under this very statute that the assessment complained of was made, and this contested case arose after the statute was in force.

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Hence, we are of opinion that the rule of evidence aforesaid, prescribed by the statute, applies to and must govern this case.

The said company, on the trial of the case in the court below, did not make a full disclosure of its capital assessable for taxation in Giles county, as appears from the above statement of facts, which need not be repeated here. It also appears from such statement of facts that said company failed to show by its evidence introduced in the trial court, nor did it otherwise appear from any evidence therein, that any items of the assessment complained of were illegal or erroneous in any particular. Therefore, there was no evidence in the instant case to rebut the *prima facie* case made by the assessment complained of, as to the whole or as to any of the items of assessment therein made. Hence, the mere absence of further proof on behalf of the defendants can avail the said company nothing.

3. Did the fact that the examiner of records had no evidence before him at the time he made the assessment in question, of the exact total amount of the omitted capital to be assessed or of the specific items of it, or of what proportions of it were being employed at the several places of business of said company in the State of Virginia, but arrived at the amounts he assessed merely from the opinion he entertained that the said company employed in its business during the preceding years in question no less amount of capital than it returned for taxation in 1916, and from a comparison of the assessments made against said company in Giles county for the preceding years in question with its return for taxation aforesaid made by it in 1916 invalidate the assessment complained of?

We are of opinion that this question must be answered in the negative.

This conclusion follows from what is stated above. The examiner of records acted in this matter in the exercise of

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judicial powers authorized by statute. It inhered in those powers as so authorized that he might make the assessment so that it would be *prima facie* valid although based on his opinion formed upon such partial and incomplete evidence as he had before him. Such evidence is, in every case of omitted taxes, left incomplete by the taxpayer himself. He is required by law to correctly disclose his property for taxation by his returns from year to year for its current yearly assessment. And by section 3 of the Acts of 1916, at p. 827, as to omitted taxes, he is given the opportunity (in such a case as that before us) to report the omitted property for taxation. The taxpayer fails to do either. We think that all the law requires of an assessing officer under such circumstances and under the other circumstances existing in the instant case (which are set forth in the statement of facts above) is, that he should act in good faith. Such officers are chosen for their integrity and the method of their appointment is relied on under our system of taxation to select such as will not by their action impose undue hardships upon taxpayers in moving the courts to correct such assessments. Errors and a consequent certain amount of such hardships are inseparable from any system of taxation. The legislature having adopted our present system, such hardships as result from its administration by the assessing officers, acting in good faith, must be borne by those affected; and for those affected by any *mala fides* of such officers, the law affords a redress, not only for the correction of the assessment, but also by action against the latter, personally and upon their official bonds. No suggestion of such *mala fides*, however, is made in the record in this case. And the failure of the said company to rebut the *prima facie* evidence afforded by the assessment, by a full disclosure of its capital subject to taxation as so assessed, which was peculiarly in its power to do, is convincing, and in this case, conclusive evidence

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that the opinion and judgment of the assessing office in making such assessment was correct.

4. Was the court below in error in refusing to admit evidence, which, if admitted, would have shown that such of the intangible personal property or capital of said company as was assessed in Giles county in 1908 to 1915, inclusive, was asssessed at the same proportion of its fair cash value as that of property of the same kind belonging to all the citizens of Giles county during those years, and was assessed at a lower percentage of its value than the law required and than was made in the 1916 assessment complained of, and in holding that such facts were immaterial in this case?

In view of the conclusions reached above, this question could affect only the amount assessed against the said company in 1916 as omitted taxes for the years 1908 to 1915, inclusive, to the extent that the 1916 assessment was on a higher scale of valuation than was the current yearly assessment of 1908 to 1915, inclusive, as to so much of such capital as was included in the 1916 assessment.

(a). One position of said company on this subject is, in substance, that, to the extent above mentioned, the assessment of omitted taxes in 1916 for the years 1908 to 1915, inclusive, is an assessment of its property at a higher rate than has been assessed in Giles county against all other owners therein of the same kind of property during those years. That this has been a denial to said company of due process of law and of the equal protection of the laws, guaranteed to it by the fourteenth amendment of the Constitution of the United States; and the following authorities are relied on to sustain such position, viz: *Greene* v. *Louisville, etc., R. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917 E, 88; *Taylor* v. *Louisville, etc., R. Co.*, 31 C. C. A. 537, 88 Fed. 350.

An examination of these authorities discloses that it is

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a systematic, intentional discrimination, by those administering the tax system of a State (whether as directed by statute or contrary to statute), against a person, by an assessment of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, which is condemned by such authorities and held to be a denial to the person first referred to of the due process of law and the equal protection of the laws guaranteed to him by the federal Constitution. This becomes more apparent from an examination of the many authorities on this subject, among which are the following, viz.: *German Nat'l Bank* v. *Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Stanley* v. *Board of Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Coulter* v. *Louisville, etc., R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; *Albuquerque Nat. Bank* v. *Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91; *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. —. But where there has been no discrimination between persons or classes of persons, but the property of the like kind of all persons in a given jurisdiction has been under-valued in its assessment for taxation contrary to law, for a correction to be made of such assessment of any individual property owner according to law, by an assessing officer, by a board of review, by a commissioner of court, by a court, or by any other legislatively authorized agency, means or instrumentality, does not fall under the ban of the authorities aforesaid relied on by said company; although it may be true that such correction may not be made as to all of the persons whose property has been thus under-assessed. If there be not a systematic, intentional discrimination between persons or classes of persons owning the same kind of property in the making or his correction of assessments, such action does not fall within the principle of the cases relied on by said

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company as aforesaid. *State* v. *Hall,* 172 Ala. 316, 54 So. 563; *Magnolia Bank* v. *Board of Supervisors,* 111 Miss. 857, 72 So. 697. As said in one of the cases last cited, " 'the equal protection of the laws,' does not mean equal immunity in its violation or evasion," and, as pointed out in substance in both of such last cited cases, if, because a law for the assessment of property has been generally evaded by or not enforced for a time against owners of the same kind of property, until it has become a custom or rule among assessing officers to assess such property of all owners thereof at a certain percentage of and less than its fair cash value, instead of at its fair cash value, as the statute on the subject may require (as it does in Virginia), it were held that the legislature and the courts or other legislatively authorized agencies, are powerless to correct any one of such assessments, until and unless all of them are corrected, that would be, in effect, to allow violators of the law to repeal the law, or to beget a constitutional right in every evader of the law to plead immunity from its enforcement except upon condition that no other evader of it be allowed to escape from its requirements. There would be an end of all government of laws if such a rule of constitutional construction could prevail.

There is no evidence in the case before us that the making or correction of its assessment for the years in question, by the assessment against it of omitted capital as aforesaid for those years, was in pursuance of any discrimination against said company, as a class or a member of a class. Hence, there is no merit in the position of said company under consideration.

(b). Another position taken by said company on the subject next above mentioned, is that the correction of the assessments complained of would deny to it the equal protection of the laws guaranteed to it by section 168 of the

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Constitution of Virginia, and the due process of law also guaranteed to it by section 11 of the same Constitution.

For the reasons stated above, in connection with the consideration of the same guaranties contained in the federal Constitution, we are of opinion that there is no merit in the last named position.

5. Was said company shielded by the bar of the statute, (sec. 508 of the Code, as amended by Acts, 1916, p. 826, par. 7), from an increase in valuation by the assessment in 1916 aforesaid of any of the intangible personal property or capital of said company thereby assessed, which was assessed and undervalued in the current annual assessments of it in the years 1908 to 1915, inclusive?

The statute mentioned in this question, so far as material, provides as follows:

"In case of omitted taxes, wherever the taxpayer has made full disclosures of his taxable property * * * as (has) enumerated on his returns the items thereof, and there has been an assessment made in good faith by the tax officer, although made under misapprehension of the law, such assessment, as to valuation, shall be final; but in cases in which there has not been a full disclosure and enumeration of his intangible personal property * * * whether intentional or otherwise, such assessment shall not be considered final, but in contested cases the burden shall be upon the taxpayer to show that he has made a full disclosure."

As appears from the facts of this case, set forth in the above statement of them, the said company made no return for the year 1908; its returns for the years 1909 to 1915, inclusive, did not enumerate the items of bark or hides composing its intangible property listed on such returns, but gave only what was listed as the aggregate fair cash values thereof for the respective years. As appears from the above statement of facts, the evidence in the record is

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that the only information on the subject given by the company to the commissioners of the revenue to whom such returns were made and who made such assessments was, "the amount and value of the bark and hides" aforesaid, read from the books of the company, and that the commissioners of the revenue, as a rule, inserted the figures of the aggregate values thereof aforesaid which appear in said returns. This evidence is obscure as to whether the number of hides or the pounds of bark were read to the commissioners of the revenue from the books of the company, or just what "amount" or what "value" was so read. We do not think that such character of proof is sufficient to show that there was "a full disclosure" of such bark and hides to the commissioners of the revenue. Certainly the "items" of them were not "enumerated on * * (the) returns," as stipulated in the statute. They were not exhibited before the commissioner of the revenue, or left to him to value upon a physical view of them by the latter. Further, there was no disclosure made to the commissioners of the revenue, or other assessing officer, or in court, of any intangible personal property of said company employed in business elsewhere in Virginia than in Giles county, which upon the record in this case we must infer existed and was assessable for taxation in Giles county for the years 1908 to 1915, inclusive, as above stated. This was a failure to make "a full disclosure," and such omission of disclosure was alone sufficient to deprive said company of the benefit of the bar of the statute in question; for such statute provides that "in cases where there has not been a full disclosure * * of his (the tax-payer's) * * intangible personal property * * whether intentional or otherwise, such assessment shall not be considered final * * *." Such disclosure might have been made by the said company in any of the three ways and at any of three times, at least, namely: (a) By its returns for the current yearly assess-

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ment for taxation of its capital employed in business in Virginia; (b) by voluntary report of omitted property on or before August 1, 1916, pursuant to the statute on this subject above mentioned: and (c) by evidence on the trial in the court below. And the said company did not make such disclosure at any of those times, or in any of these ways, or in any other way, so far as appears in evidence.

Therefore, the question under consideration must be answered in the negative.

The sole question raised by the assignments of error remaining for our consideration, which has not been disposed of by our conclusions above stated, is the following:

6. Should the taxes, imposed as aforesaid in this case, bear interest?

The assessment in question having been made when said Act of 1916, p. 826, was in force, which contained no provision giving discretionary powers to the assessing officer, or to the court, on the subject of interest (the omitted property not having been voluntarily reported for taxation on or before August 1, 1916, as provided for in section 3 of such statute), as did section 508 of the Code as it at one time existed prior to its amendment by said enactment in 1916, the taxes in question must bear interest.

In the case of *Commonwealth* v. *United Cigarette Machine Co., supra,* 119 Va. 447, 89 S. E. 435, cited and relied on by said company on the question under consideration, the assessment of omitted taxes involved was made before said 1916 amendment of said section 508. In the instant case, the assessment in question was made under such statute as it stood after such amendment. Hence, the assessing officer had not, nor did the court below have, any discretion as to interest.

For the foregoing reasons, we are of opinion that there was no error in the action of the court below complained of, and its judgment will be affirmed.

Affirmed.

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Syllabus.

Staunton.

WILLIAMS AND ANOTHER v. WILLIAMS.

September 19, 1918.

1. WILLS—*Joint Wills—Validity—Admission to Probate.*—The doctrine of the earlier authorities was that all joint wills were invalid; but it is now settled that such wills are good and may be admitted to probate successively upon the death of each testator as his separate will.
2. WILLS—*Joint Wills—Revocation.*—Generally speaking, wills are in their nature ambulatory or revocable, and cannot be made otherwise, even by the most express terms. This inherent quality of revocability belongs to all wills which do not partake of the nature of a contract. The mere fact that the will is made jointly by two or more testators does not affect the right of either to revoke the same at his pleasure, whether the revocation be made before or after the death of the others; but the fundamental reason for this rule is that every purely testamentary disposition of property is in the nature of a gift, and a different rule applies where a contract "is disguised under the name and appearance of a will." In the latter event the contractural nature of the instrument does not necessarily defeat its character as a will, but enables the party for whose benefit the contract was made to prevent, by resorting to a court of equity, a revocation which would destroy the compact or the trust created thereby.
3. WILLS—*Joint Wills—Probate—Specific Performance.*—While a court of probate cannot admit a joint or mutual will to probate as the will of one of the testators who has revoked the same on his part, it has long been well settled that a court of equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent fraud, may, in a proper cause, enforce the agreement, notwithstanding a revocation by one of the parties, by decreeing specific performance of the agreement, or by fastening a trust on the property in favor of the beneficiaries of the will revoked in violation of the agreement.

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4. WILLS—*Joint Wills—Consideration for Contract.*—It is not essential that in order for a joint will to be mutual or reciprocal that each co-testator receive some advantage thereunder from the other.
5. WILLS—*Joint Wills—Consideration for Contract—Benefit of Third Party.*—Where reciprocal testamentary provisions are made for the benefit of a third party, there is a sufficient consideration for the contractural element in the will (assuming that the contract itself is established) to entitle the beneficiary to enforce the same in equity.
6. WILLS—*Joint Wills—Evidence of Agreement and Consideration—Proof of Testamentary Compact.*—Undoubtedly the proof of the agreement and consideration must be clear and satisfactory; but proof of a testamentary compact may expressly appear in the language of the instrument, or it may be supplied by competent witnesses who testify to admissions of the testators, or it may result as an implication from the circumstances and relations of the parties and what they have actually provided for by the instrument. Direct evidence is not necessary.
7. WILLS—*Joint Wills—Evidence of Agreement and Consideration—Proof of Testamentary Compact—Case at Bar.*—In the instant case, the situation of the parties with reference to the respective lands devised, their relationship to the beneficiaries, their statements to the witnesses, taken with the provisions of the will itself, leave little room to doubt that the division of the property was the result of a mutual agreement between the co-testators, husband and wife, which, at the death of the wife, became fully executed on her part and irrevocable by the husband.

Appeal from a decree of the Corporation Court of city of Bristol. Decree for complainant. Defendants appeal.

Affirmed.

The opinion states the case.

White, Penn & Penn and *Hutton & Hutton*, for the appellants.

L. P. Summers, for the appellee.

KELLY, J., delivered the opinion of the court.

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This is a suit in the nature of a suit for specific performance, brought by one of the beneficiaries under a joint will to enforce the provisions thereof in her favor. The joint testators were Thomas Pippin and Polly Pippin, his wife. The complainant in the suit, the appellee here, is their daughter, Nancy K. Williams, and the active defendants, the appellants here, are her children, Thomas E. and Albert Williams.

The relief prayed for was granted, and the first assignment of error complains of an interlocutory decree overruling a demurrer to the amended bill upon which the cause was heard. The case, as substantially stated therein, was as follows: That Thomas Pippin owned a tract of 120 acres of land, Polly Pippin, his wife, a tract of sixteen acres, and the two, jointly, a third tract of ten acres; that in March, 1899, the testators, both being then advanced in years, mutually agreed upon a testamentary disposition and division to be made of this property, whereby Polly Pippin was to give all of her lands to Albert K. and Thomas E. Williams, and in consideration of this disposition of Polly Pippin's lands, Thomas Pippin was to give his land (with the exception of three and one-half acres given to Thomas E. Williams) to Nancy C. Williams and another daughter, Laura Henderson and her children; that, accordingly, Thomas Pippin and Polly Pippin executed their joint will, devising their lands pursuant to this agreement; that Polly Pippin died in 1911, and the will was admitted to probate as to her in 1913; that in the meantime, on August 2, 1912, Thomas Pippin, who survived his wife and was then about eighty-three years of age, conveyed to Thomas E. and Albert K. Williams all the lands embraced in the joint will which had been devised therein to Nancy C. Williams and Laura Henderson; that while the paper jointly executed by Thomas and Polly Pippin was called a will by the scrivener whom they secured to assist them in drafting the same,

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it was, in fact, a mutual agreement as to the disposition of their property which Thomas Pippin did not have the power to disregard.

It was also alleged that Thomas Pippin was mentally incompetent to make the deeds, and that the same were procured by undue influence exerted over him, but these allegations are not now material to the controversy.

The demurrer was properly overruled. The doctrine of the earlier authorities was that all joint wills were invalid (Schouler on Wills, section 456; 40 Cyc. 2112); but it is now settled that such wills are good and may be admitted to probate successively upon the death of each testator as his separate will. 40 Cyc. 2112; *Davis Will Case*, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; *Ginn* v. *Edmundson*, 173 N. C. 85, 91 S. E. 696. There is no difference in this respect between a joint will which contains mutual and reciprocal provisions and one which does not; either is recognized by the probate courts. There is an important difference, however, in respect to the power of revocation. Generally speaking, wills are in their nature ambulatory or revocable, and cannot be made otherwise, even by the most express terms. This inherent quality of revocability belongs to all wills which do not partake of the nature of a contract. The mere fact that the will is made jointly by two or more testators does not affect the right of either to revoke the same at his pleasure, whether the revocation be made before or after the death of the others; but the fundamental reason for this rule is that every purely testamentary disposition of property is in the nature of a gift, and a different rule applies where a contract "is disguised under the name and appearance of a will." 2 Minor's Inst. (4th ed.) 1021; *Hale* v. *Hale*, 90 Va. 728-730, 19 S. E. 739. In the latter event the contractural nature of the instrument does not necessarily defeat its character as a will, but enables the party for whose benefit the contract was made to

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prevent, by resorting to a court of equity, a revocation which would destroy the compact or the trust created thereby.

"Under the head of joint or mutual wills, our courts often discuss this irrevocable quality of a will under those exceptional circumstances which import a valuable and reciprocal consideration. And it is here that courts of equity assume the difficult problem of enforcing a specific performance, so to speak, of the testamentary disposition, or rather of a testamentary compact involving the making of a joint or mutual will in accordance with the mutual agreement of the parties." Schouler on Wills, section 455.

"While a court of probate cannot admit a joint or mutual will to probate as the will of one of the testators who has revoked the same on his part, it has long been well settled that a court of equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent fraud, may, in a proper cause, enforce the agreement, notwithstanding a revocation by one of the parties, by decreeing specific performance of the agreement, or by fastening a trust on the property in favor of the beneficiaries of the will revoked in violation of the agreement." 40 Cyc. 2117; *Carmichael* v. *Carmichael,* 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Bower* v. *Daniel,* 198 Mo. 289, 95 S. W. 347; *Edson* v. *Parsons,* 155 N. Y. 555, 50 N. E. 265.

We have no difficulty in deciding that the facts alleged in the amended bill, if true, entitle the complainant to the relief sought.

The second assignment of error challenges the correctness of the final decree whereby, after all the proof had been taken, the court adjudged that the complainant was entitled to the land devised to her in the will, directed that she recover the possession thereof from the defendants, required them to execute and deliver to her a release deed

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therefor, and provided for a commissioner's deed for that purpose in case they should not comply with this requirement within thirty days.

There is a contention not very material to the merits of the case but insisted upon in the brief of counsel, that the decree is erroneous because there was no evidence to show which of the deeds of August 2, 1912, if either, covered the real estate devised by the will to the appellee, or which of the appellants, if either, was in possession of the same, or any part thereof. Of this contention it is sufficient to say that while there was no proof of these facts none was necessary, since they were substantially admitted by the fourth paragraph of the joint answer filed by the appellants.

Upon the really contested question in the case, it is contended by counsel for the appellants that the instrument in question in this case is a "joint will pure and simple," and that in order for a "joint will pure and simple," and that in order for a "joint will to be mutual or reciprocal, it is absolutely essential that the co-testators receive some advantage thereunder from the other."

The usual instances of mutual will are those in which the mutuality rests upon some benefit to be directly derived from the instrument by the surviving testator, but it is manifest that this feature is not necessary to the mutuality which the authorities recognize as the basis for a binding testamentary compact between two testators. In a note to section 455 of Schouler on Wills, it is said: "One promises to make a will of all his property in favor of a second person who, in consideration thereof, agrees to make a similar will in favor of the first; the advantage thus to accrue being to such of the two as may happen to survive the other. Or the joint consideration may relate to a disposition in favor of third persons; however, here courts are not so well disposed to enforce the cumbrous arrangement. In short, parties may agree between themselves to execute mutual

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and reciprocal wills, which, though remaining revocable in a sense, become, upon the death of one, fixed obligations of which equity will assume the enforcement on an ultimate beneficiary's behalf (having no full remedy at law) if the survivor attempts to impair them." Citing *Edson* v. *Parsons, supra.*

It is true that in the case of *Edson* v. *Parsons,* cited above, the court held that the alleged testamentary compact was not established, and that the case of *Frazier* v. *Patterson,* 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003, cited in the opinion of the corporation court, as set out below, was one in which the instrument involved made certain provisions for the benefit of the surviving testator as well as for the ultimate beneficiary; but both of these cases may be safely regarded as authority for the proposition that where reciprocal testamentary provisions are made for the benefit of a third party, there is a sufficient consideration for the contractural element in the will (assuming that the contract itself is established) to entitle the beneficiary to enforce the same in equity. This principle is distinctly recognized and succinctly stated in the quotation from *Deseumeur* v. *Rondel,* 76 N. J. Eq. 394, 74 Atl. 703, embodied in the opinion of the trial court and incorporated herein.

The trend of modern decision favors the recognition and enforcement of contractural features of joint wills. See note to *Robertson* v. *Robertson,* 136 Am. St. Rep., page 598.

Undoubtedly the proof of the agreement and consideration must be clear and satisfactory (Schouler on Wills, section 454; 4 Cyc. page 2118-c; *Swann* v. *Housman,* 90 Va. 815, 20 S. E. 830); but in the instant case we think this condition is fully met. Proof of a testamentary compact may expressly appear in the language of the instrument, or it may be supplied by competent witnesses who testify to admissions of the testators, or it may result as an implica-

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tion from the circumstances and relations of the parties and what they have actually provided for by the instrument. Direct evidence is not necessary (40 Cyc. 2118). Here, the situation of the parties with reference to the respective lands devised, their relationship to the beneficiaries, their statements to the witnesses Crumley, Ingle and Bradley (disregarding entirely any consideration of the testimony of the appellee, whose evidence we think was not admissible), taken with the provisions of the will itself, leave little room to doubt that the division of the property was the result of a mutual agreement between the co-testators which, at the death of Polly Pippin, became fully executed on her part and irrevocable by the survivor. The devise of the property of Polly Pippin to the appellants was an entirely sufficient consideration for the agreement on the part of Thomas Pippin to devise his property to the appellee and others.

This conclusion reaches the clear natural equity of the particular case and is in harmony with those authorities on the subject which most commend themselves to us.

The judge of the Corporation Court of the city of Bristol delivered a written opinion in this case which was made a part of the record, and in which he presented the facts and the law in a most satisfactory manner. Omitting certain portions thereof, which in view of the foregoing discussion need not be inserted here, we quote from that opinion as follows:

"Under date of March 28, 1899, Thomas Pippin and Polly Pippin, his wife, executed under seal as their will the joint writing filed as a part of the original bill as Exhibit A. At the time they were from sixty-five to seventy-five years of age. Nancy C. Williams, sometimes called Kate Williams, the complainant, is their daughter. She has been a widow for many years. Thomas E. Williams and A. K. Williams, the defendants, are their grandsons, and sons of com-

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plainant. These are the only parties before the court. By their joint will the testators make a joint disposition of their separate lands. That is, all of the devisees are joint, whereas a part of the land was owned by Thomas Pippin and a part thereof by Polly Pippin, and they each owned a moiety of a ten-acre tract. The land devised to A. K. Williams was in fact the separate property of Polly Pippin. A moiety of ten acres which was devised to Thomas E. Williams was also hers. But all of the land which was thus jointly devised by them to complainant was the separate property of Thomas Pippin. This will was written and attested by Rev. T. J. Crumley and Rev. A. H. Ingle, lifelong friends of the testators, and was placed with Rev. Ingle as custodian, who kept it until it was probated March 7, 1913, as the last will of Polly Pippin, she having died on April 6, 1911, without any revocation thereof by either party at the time of her death. Nancy Williams served these old people faithfully and as a daughter should until some months prior to the death of her father on February 23, 1913. About four months prior to his death Thomas Williams and wife moved into the house with their grandfather, and after that complainant did not go about her father, not even during his last illness, she claiming that she could not get along with her daughter-in-law. For a year and probably longer before his death, Thomas Pippin took a dislike for complainant because of her association with one Grant Nunley—not that their relations were in any sense illegal or improper—but it seems that for some reason he did not like him. He, therefore, formed a declared purpose to make a different disposition of his lands if he could do so, and even inquired of Mr. Ingle whether there was any clause allowing either party to revoke the will, and was informed in the negative. Under date of August 2, 1912, Thomas Pippin executed the deeds, filed as a part of the bill as Exhibit B and Exhibit C, to Thomas E.

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Williams and A. K. Williams, respectively, thereby conveying to them all of the land owned by him in his own right, thus defeating or attempting to defeat the joint will as to all of his property, and defeating all provision therein in favor of complainant. Both deeds provide that they are not to be effective until after the death of the grantor, and he reserves full control and possession of the land for the remainder of his life. A vendor's lien is retained in both deeds to secure the payment of small amounts to the beneficiaries therein named within a specified time after the death of the grantor. Complainant was to be paid $100 without interest, in two instalments of $50 each, under the deed to Thomas E. Williams, in one and two years after possession was acquired by him on the death of Thomas Pippin. Complainant refused a tender of the money after her father's death. The deed to Thomas E. Williams has this additional provision: 'The party of the second part is to support and take care of the party of the first part during the remainder of his life.' Thomas E. Williams does not sign the deed so as to make this clause a covenant on his part. However, afterwards, on October 23, 1912, he and his wife moved into the home with Thomas Pippin. None of the amounts mentioned in the deeds were paid until some time after the will was probated and most of them after this suit was brought. It is not shown that defendants or either of them knew the contents of the will at the time the deeds were made nor until after the death of Thomas Pippin. A. K. Williams says that he had heard his grandparents state that they had made a will. He was present and heard the will read when it was probated. Thomas E. Williams was present when Mr. Pippin gave Mr. John J. Stuart the information to prepare the deeds. Mr. Stuart, a witness for defendants, states that he understood Mr. Pippin was endeavoring by the deeds to dispose of all of his land, and his statement in part is: 'I think he stated to me that he and his wife had

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already made a will at the time I prepared these deeds. I think the will might be called a mutual will,' etc.

"In their answer defendants do not claim to be purchasers. They both say that they in no way induced their grandfather to execute the deeds. A. K. Williams says he did not even know of the deeds until about a month before his grandfather died. Nor does Thomas E. Williams in the answer claim that the deed to him should stand as against complainant on account of care, attention or services rendered to his grandfather, that 'no charge was made for this.' The answer, in substance, states that whatever was done by Thomas Williams and wife in this regard was all prompted by love and affection. Their defense is grounded alone upon the claim that their grandfather had the absolute right to revoke the joint testamentary disposition of all of the land of both testators so far as his property was concerned, and that he did so by the deeds of August 2, 1912.

"It is averred in the amended bill and admitted in the answer that defendants are each now holding title and possession under the joint will of the respective parcels of land thereby devised to them and which was owned by their grandmother, Polly Pippin. They claim that in all other respects the joint writing has been revoked, but that it is a valid disposition to them, respectively, of the tracts and interests belonging to her.

"As to the situation of the parties and circumstances at the execution of the joint testamentary writing, Mr. Crumley testifies that he wrote the will and that Mr. Ingles assisted in the wording thereof, and further states: 'We only wrote as they dictated the division of their land,' naming the parties; and in another answer his reply is: 'They said they wished the division made in that way—both of them agreed together there, as I understood it—perfectly agreeable to distribute the land as mentioned in the will.

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They dictated the entire will to us.' Complainant testified in a general way that the testators told her that they had entered into a contract for a division of their property as was done by the will. John O. Bradley, a disinterested and reliable witness as well as a close friend of the testators, testified to a conversation with Thomas Pippin regarding a division of the property between their children and grandchildren, which conversation took place after the will was made, and in which Mr. Pippin 'told me that they had fixed up the business and divided the property as they wanted it divided; I don't know what year it was, but he said, we have fixed up this business, and we have laid it off the way we want it.' * * *

"The instrument involved in the case at bar is a joint and mutual will. It does not recite in terms that it is mutual. Can the court say that Thomas Pippin intended not to be bound by uniting under seal in the execution of the paper? It means nothing if it does not mean that the devises of Polly Pippin's separate property to defendants was the consideration for the devise of Thomas Pippin's separate property to complainant as described in the third clause thereof. If what the parties did is in fact mutual, if the one is the consideration for the other, will their saying so make it any more effective?

"In *Frazier* v. *Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003, the form and language of the instrument involved as well as the situation of the testators as to the ownership of their property, and the principles of equity invoked and applied, were all substantially the same as in the case at bar. In that case the will did not say that it was mutual, but it was so held. The sole issue there to be decided was: 'Does the joint will itself, on its face, sufficiently prove a compact or agreement to make a will mutually disposing of their property, each for and in consideration of the will of the other?'

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"The court deduces from the cases there reviewed and cited, and as resting 'upon sound, equitable grounds,' the following proposition of law:

" 'That such wills constituted a mutual contract between the parties which could not be rescinded by the survivor after the death of one on the theory that the first that dies carries his part of the contract into execution.' 17 Ann. Cas. 1005.

"It was there expressly contended that in order to sustain the will as a compact, 'that proof *aliunde* the will should be introduced, showing that the mutual will was the result of a contract or mutual understanding that such will should be made.' In answering this claim the court there further declared:

" 'There are cases which appear to support this contention, but it will be found that this rule is more particularly applicable to mutual wills rather than to those which are both joint and mutual. If two persons make wills, each devising his property to the other, there is no necessary inference that the wills were the result of any mutual or reciprocal agreement or understanding. Such wills might be executed without either party knowing that the other had executed his will; but where the parties execute their wills by the same instrument, it is not possible that such course could be adopted without some previous understanding or agreement between them. Each would necessarily know what disposition the other had made of his property. This inference is especially strong where the parties are husband and wife, and where they have a common interest in the welfare of the devisees. * * * If evidence of a mutual compact is necessary in such case, that evidence is afforded by what the parties did. We cannot see how the situation would be any different if witnesses had testified that they heard this husband and wife discuss what disposition they would make of their respective estates, and that

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they agreed with each other that they would make a joint will such as they did make. The fact that they made such will is satisfactory proof to our minds that it was done in accordance with their mutual compact to dispose of their property in this manner.' 17 Ann. Cas., pages 1005-6.

"In *Bower* v. *Daniel,* 198 Mo. 289, 95 S. W. 347, the joint will did not recite any consideration or in terms say that it was mutual, but the court likewise so held. Among other things it was declared 'that but for these mutual bequests the parties would, in all probability, have made separate wills.' 198 Mo. 321, 95 S. W. page 357. In that case the surviving testator attempted to defeat the joint will in part by a subsequent will as to some of his property, and in part, as in the case at bar, by making deeds reserving a life estate. After an exhaustive discussion (198 Mo. 328, 95 S. W., at page 359), the court concludes: 'There can be no question, we think, that the testator executed those voluntary conveyances and made the subsequent will for the purpose of defeating the joint will, which acts were, in our opinion, ineffective for that purpose.'

"Let us look at this case in a practical way from another angle. Suppose defendants should make a written contract to sell the land claimed by complainant and upon suit for specific performance their proposed vendee should answer that the title is not merchantable, that he finds on record the joint will which has already been probated as the will of Polly Pippin wherein it appears to have been agreed that the land was to go to complainant; under this state of facts, although the beneficiary was not before the court, it was held in the case of *Deseumeur* v. *Pendel,* 76 N. J. Eq. 394, 74 Atl. 703, that such a title was not good and the vendee could not be forced to take it. On page 402 of 76 N. J. Eq., and page 707 of 74 Atl., the law applicable is stated thus:

" 'It is undoubtedly the law that if two people, upon suffi-

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cient consideration, agree to do something for the benefit of a third, such contract or agreement may be enforced as against the two contractors. It is equally well settled that, upon legal consideration, parties may agree to dispose of their property at the time of their deaths in certain specified ways, or to certain specified people.'

"The instrument under consideration was very similar to the one at bar, and the court reviews all of the authorities, and although the will purported to be mutual the court declined to characterize it at all, because immaterial, saying at page 403 of 76 N. J. Eq., and at page 707 of 74 Atl., whether the paper, which was also executed by husband and wife, 'was a will or not, it is perfectly clear that it expressed the understanding and agreement between those people at the time concerning the disposition of their property after their death. If, therefore, it was founded upon sufficient consideration, a court of equity would sustain the same and decree its enforcement' in behalf of the 'persons in whose favor it runs.' 76 N. J. Eq. 405, 74 Atl., page 708.

"See also *Roberston* v. *Robertson*, 94 Miss. 645, 47 South. 675, 136 Am. St. Rep. 589, and exhaustive note, pages 592-605, wherein the doctrine of the foregoing cases is also approved.

* * * * * *

"Defendants rely upon the statute of frauds and in support of this claim cite *Hale* v. *Hale*, 90 Va. 728, 19 S. E. 739. There, two sisters made separate will in favor of each other, the wills not referring to each other nor to any contract. That case is wholly unlike the case at bar. The will was revoked in the lifetime of both by the marriage of one of the sisters. Here both parties sign under seal the same instrument which is complete in itself either as a will or as a compact, and which was in no way revoked during the life of both parties, and which was carried into execution on one side by the death of Polly Pippin and title and pos-

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session accepted thereunder by defendants so as to render the statute inapplicable.

"Therefore, it must be concluded, that complainant is entitled to the land described in the third clause of the joint writing filed with the original bill; that defendants should surrender possession thereof to her, and they should release and convey to her by proper deed all their respective title or interest thereto by virtue of the deeds of August 2, 1912; and that if they fail or refuse to make such conveyances whithin a reasonable time, the decree should further provide that a commissioner be appointed to make same for them, using the same description as used in the third clause of Exhibit A. See *Milton* v. *Kite*, 114 Va. 256-261, 76 S. E. 313."

We may add that we do not attach any importance to the fact that the instrument in this case was under seal. The consideration was supplied by the mutuality of the devises, and the signature of the parties was sufficient to take the case out of the statute of frauds. Whether the fact that a seal was affixed to the instrument dispenses with the necessity of proving a consideration, is a question which was discussed in the briefs and in the opinion of the trial court, but which, in our view, need not be decided here.

We find no error in the decrees complained of, and they are affirmed.

Affirmed.

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Richmond.

BAYLOR V. HOOVER.

November 14, 1918.

1. INSTRUCTIONS — *Directing Verdict.*—A peremptory instruction granted by the court on request of plaintiff, directing a verdict for plaintiff, which entirely ignores defendant's theory of the case, and omits all evidence tending to sustain it, is in contravention of the settled doctrine that an instruction that in substance directs a verdict must cover every phase of the case that is supported by evidence.
2. INSTRUCTIONS—*Conflicting Theories—Failure to Present One of the Theories.*—Where, as in the instant case, the evidence presents conflicting theories of a case, each party is entitled to an instruction submitting his theory to the jury. An instruction covering only one of such theories gives undue emphasis to that theory, and does not fairly submit the case to the jury, and for that reason is erroneous. In the case at bar the court granted plaintiff's instruction directing a verdict for him and refused an instruction requested by defendant submitting his opposing theory of the case. The evidence vouched in support of it proved, or tended to prove, the correctness of that theory.
Held: That, the court erred in rejecting the instruction.

Error to a judgment of the Corporation Court of city of Staunton in an action of assumpsit. Judgment for plaintiff. Defendant assigns error.

Reversed.

The opinion states the case.

Jos. A. Glasgow, for the plaintiff in error.

Timberlake & Nelson, for the defendant in error.

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WHITTLE, P., delivered the opinion of the court.

This motion was brought by J. Earl Hoover, a real estate agent (who will be referred to as plaintiff) against plaintiff in error, J. Frank Baylor (styled defendant), to recover $700, with interest, subject to a credit of $50, alleged to be due and owing by defendant to plaintiff as commissions for negotiating a sale of his farm. Issue was joined upon a plea of non-assumpsit, and the jury having found a verdict for plaintiff, the court rendered the judgment under review in his favor.

Defendant listed his farm for sale with plaintiff at a named price, "and, if sold," agreed to pay him a commission of five per cent. "on the total amount of the sale." In point of fact the farm was never sold, though the evidence shows defendant did all in his power to consummate the sale that plaintiff undertook to negotiate. On the part of plaintiff there was evidence that tended to prove that he produced a prospective purchaser, Charles T. Carson, to examine the farm, and introduced him to defendant; and that thereupon defendant entered into negotiation with Carson for the sale of the farm, which culminated in the signing of the written contract of January 3, 1916, Carson signing for himself and attaching the name of his wife to the instrument, she not being present but at her home in West Virginia at the time. These excerpts from the evidence formed the basis of a peremptory instruction granted by the court on request of plaintiff, directing a verdict for plaintiff if the jury should believe from the evidence that the above recited incidents were true.

This ruling of the court constitutes fundamental error. The instruction entirely ignores defendant's theory of the case, and omits all evidence tending to sustain it, in contravention of the settled doctrine that an instruction that in substance directs a verdict must cover every phase of

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the case that is supported by evidence. That principle has been held by this court in numerous instances. *Sun Life Assurance Co.* v. *Bailey,* 101 Va. 444, 44 S. E. 692; *Pocahontas Col. Co.* v. *Hairston,* 117 Va. 118, 124, 83 S. E. 1041; *Atlantic Coast Line R. Co.* v. *Newton,* 118 Va. 222, 227, 87 S. E. 618; *Ratcliffe* v. *McDonald,* 123 Va., *post,* 97 S. E. 307, decided at the present term.

It is also well settled that where, as in this instance, the evidence presents conflicting theories of a case, each party is entitled to an instruction submitting his theory to the jury. An instruction covering only one of such theories gives undue emphasis to that theory, and does not fairly submit the case to the jury, and for that reason is erroneous. *Va. Ry. & P. Co.* v. *McDemmick,* 117 Va. 862, 868, 86 S. E. 744; *Hurley* v. *Shortridge,* 118 Va. 136, 86 S. E. 858; *Washington & O. D. Ry.* v. *Ward,* 119 Va. 334, 89 S. E. 140; *N. & W. Ry. Co.* v. *Parrish,* 119 Va. 670, 89 S. E. 923.

The court denied defendant's request for seven instructions, and only gave the instruction for plaintiff referred to above. Defendant's instruction No. 1 submitted his opposing theory of the case, and the evidence vouched in support of it proved, or tended to prove, the correctness of that theory. Therefore, upon the authorities cited, the court erred in rejecting the instruction.

For these errors we are of opinion that the verdict of the jury should be set aside, the judgment reversed, and the cause remanded for a new trial to be had not in conflict with the views stated in this opinion.

We have thought it best not to pass on the minor instructions requested by defendant and rejected by the court, at this time, leaving the parties free at the next trial to request such instructions as they may be advised are proper in the case as then presented.

Reversed.

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Richmond.

BUCHANAN, ADMINISTRATOR v. HIGGINBOTHAM.

November 14, 1918.

1. ACCOUNT STATED—*Transactions Between Others than Merchants.*—While the doctrine as to accounts stated may originally have had its origin in transactions between merchants, it has quite generally been extended to all cases where the relation of debtor and creditor exists.
2. ACCOUNT STATED—*Account Between Others than Merchants.*—Between merchants, the failure to dispute an account rendered, after a lapse of a reasonable time, amounts to an admission of its correctness, and even though an account rendered between others than merchants may not become technically an account stated, a retention without objection, of the account by the party to whom rendered, may be taken to show an implied admission or acquiescence in its correctness, the weight of the testimony being for the consideration of the jury, under the circumstances of the particular case.
3. ACCOUNT STATED — *Objections — Time of Making — Burden of Proof.*—Objections to accounts rendered, which will prevent them from being deemed stated accounts, must be made within a reasonable time; and the burden of proving that objection was made within a reasonable time rests upon the party contesting the account so rendered; the rule is founded on the acquiescence of the party charged.
4. DOCUMENTARY EVIDENCE—*Books as Evidence—Admissibility.*—Entries in books, in order to be admissible, ordinarily must have been made in the regular course of business and as a part of the party's system of keeping his accounts. The fact that the entries are made by clerks in the regular routine of their employment, and under the natural impulse of an employee to perform his duties accurately, is the safeguard of the accuracy of the entry. Indeed, under the systems of bookkeeping in modern business houses, the mechanical precision with which numerous employees record various transactions, together with the absence of any personal motive to misrepresent the facts of the transaction, makes the modern book of accounts a very high form of evidence in respect of transactions that are the proper subject matter for a book of account.

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5. DOCUMENTARY EVIDENCE—*Books as Evidence—Cash Payments.*—Books of account of banks and bankers are admissible to prove cash advances, loans and other cash items, and this rule has been frequently extended to others where the entries in respect to cash transactions are made in the regular course of business and not merely as casual transactions foreign to the general character of the business conducted by him. The loan or payment of small sums may be proved by books, upon the ground that they are not within the reason of the general rule, that large cash transactions, out of the ordinary course of business cannot be thus proved.
6. DOCUMENTARY EVIDENCE—*Books as Evidence—Cash Payments—Case at Bar.*—In the instant case, the relatively small payments of cash in question, some of them being apparently in settlement of accruing rent, in accordance with the previous custom of the parties, come within the exception to the general rule that cash payments cannot be proved by book accounts.
7. GIFTS—*Presumption—Members of a Family.*—Although in the absence of evidence to the contrary, services and payments made by members of the same family and household to each other are presumed to be gifts, charges regularly made by a step-son, a merchant, against his step-mother and accounts rendered therefor negatives the suggestion that these payments were intended as gifts, and show clearly that they were not so intended.
8. EXECUTORS AND ADMINISTRATORS—*Proof of Indebtedness to Estate—Duty of Executor.*—Where a cause was referred to a commissioner, who took the evidence submitted and reported in favor of the complainant, it was the duty of the defendant, the personal representative of a decedent, if he knew of any evidence to sustain his allegations of indebtedness by complainant to the decedent, or to discredit the account of the complainant, to produce it before the commissioner for consideration, or at least to give the names of the witnesses to the commissioner, so that they might be summoned. Only one inference can be drawn from his failure to do so, and that inference is that no such evidence exists. The criticism that the commissioner did not seek such testimony is not justified.

Appeal from a decree of the Corporation Court of city of Staunton. Decree for complainant. Defendant appeals.

Affirmed.

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The opinion states the case.

J. M. Perry and *H. J. Taylor*, for the appellant.

Timberlake & Nelson, *Charles Curry* and *L. Travis White*, for the appellee.

PRENTIS, J., delivered the opinion of the court.

The complainant in the trial court, A. T. Higginbotham, instituted his suit against the appellant as the personal representative of Laura T. Higginbotham, deceased, alleging that she was at the time of her death indebted to him in the sum of $1,496.56, and filed an itemized account as an exhibit with his bill. This account, running from September, 1907, to September, 1911, contained charges in every month during that period except one. The defendant denied the allegations of the bill and called for strict proof of such indebtedness, and alleged upon information and belief that the complainant was largely indebted to the decedent on several accounts. It is unnecessary to refer further to any of these allegations of indebtedness to the decedent, except to the claims that the complainant boarded with the decedent for some years and had never paid anything therefor, that for years he occupied the decedent's stable, and that his wife also boarded with decedent for almost a year, because there was no evidence offered or suggested to support any other of such claims.

The cause was referred to a commissioner, who took the evidence submitted and reported in favor of the complainant. The report was excepted to by the defendant, but the exceptions were overruled, and there was a decree in favor of the complainant, which is under review.

As to the allegation that the complainant was indebted to the decedent for board and for rent of the stable, it

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appears from the evidence she was the step-mother of the complainant, and that after his father's death he continued to live with her, and that there was a distinct understanding between them that no such board or rent should be charged because he furnished from his produce store and from other sources, fruits, vegetables and other family supplies fully equal to if not greater in amount than the value of such board and rent. The relations between them were affectionate and cordial.

The complainant occupied as his place of business a store owned by the decedent, for which it appears that he credited her with rent at the rate of $300 a year, and he charged her with taxes, and insurance premiums on her property, repairs and improvements to her dwelling, paid by him, with coal furnished, cash paid her, and other small items, very much the larger number of which are for chicken feed, bought by the complainant from another merchant, and the balance claimed by him thus arises.

The defendant challenged the admissibility and sufficiency of the evidence to support the decree. This evidence consisted of the account, and the books in which the account appears, which were tendered as evidence, supported by the testimony of the bookkeeper who made the entries therein from and after January, 1910, until the death of the decedent in September, 1911. It appears that the balance apparently due by the decedent at the time this bookkeeper commenced keeping the account was $35.30, and the bookkeeper testified that all of the entries therein from and after that date were made regularly as a part of her duties as bookkeeper, at or near the time of the transactions, and by direction of the complainant; that at the end of the year 1910, after crediting the rent for the year 1910, there was a balance due of $1,235.30, and that the account showing this fact was rendered to the decedent. After that date and until the death of the de-

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cedent, in September, 1911, the total of debits charged which are here questioned amounts to $303.54, while the rent which accrued in the same period and was credited on the account amounts to $208.34, and there is another credit of $43.44.

The question, then, is whether, in the absence of any testimony whatever discrediting the complainant's claim, his books, regularly kept in connection with his mercantile business, the evidence of the bookkeeper who kept them, and the account rendered, are sufficient to sustain the decree.

It is impossible to reconcile all of the cases as to the effect of the failure to question an account rendered. There is a comprehensive note to the case of *Smith* v. *Smith*, 163 N. Y. 168, 57 N. E. 300, in 52 L. R. A., at p. 545, and a thorough discussion of the question in the note to *Sheridan Coal Co.* v. *C. W. Hull Co.*, 87 Neb. 117, 127 N. W. 218, in 138 Am. St. Rep., at p. 441.

There are certain propositions, however, which are well established, which are decisive of this controversy.

In 1 *Corpus Juris* 679, it is said that "While the doctrine as to accounts stated may originally have had its origin in transactions between merchants, it has quite generally been extended to all cases where the relation of debtor and creditor exists."

Mr. Wigmore says, with clearness and confidence: "In one situation, however, there has been a uniform rule, namely, that the failure to dispute an account rendered, after a lapse of a reasonable time, amounts to an admission of its correctness." 2 Wigmore on Ev., 1265, section 1073; *Fayette Liquor Co.* v. *Jones*, 75 W. Va. 119, 83 S. E. 728; Note 29 L. R. A. (N. S.) 348.

Some courts have limited the rule, that an account may become stated by silence from which acquiescence may be inferred, to accounts between merchants only; but even

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though an account rendered between others than merchants may not become technically an account stated, we think that it is nowhere doubted that the evidence of such retention without objection, between parties other than merchants, may be taken to show an implied admission or acquiescence in its correctness, the weight of the testimony being for the consideration of the jury, under the circumstances of the particular case. 1 *Corpus Juris* 696.

In Virginia, it has been settled since the case of *Townes* v. *Birchett,* 12 Leigh (39 Va.) 173, that the doctrine is not restricted to merchants, and it is there held that the rule is not confined to accounts rendered by merchant to merchant of mutual dealings between them as merchants, much less between merchants abroad and merchants at home; that objections to such accounts rendered, which will prevent them from being deemed stated accounts, must be made within a reasonable time; that the burden of proving that objection was made within a reasonable time rests upon the party contesting the account so rendered; and that the rule is founded on the acquiescence of the party charged.

In *Goldsmith* v. *Latz,* 96 Va. 680, 32 S. E. 483, it was held that where an account is rendered and is retained by the party to whom it is rendered, without objection, there arises a strong presumption of its correctness, and throws the burden of proving error therein upon the party who alleges such errors.

These authorities make it clear that there is a *prima facie* presumption of the correctness of so much of the account here involved, as was rendered January 1, 1911, which showed a balance of $1,235.30 due by the decedent to the complainant.

The correctness of the items charged in the nine months of 1911, immediately preceding the death of Mrs. Higginbotham (if certain general statements of the book-

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keeper are insufficient), depends upon whether the book accounts and books of the complainant can be introduced as evidence.

This is stated of the "shop book" rule in 10 R. C. L., p. 1179: "Entries in books, in order to be admissible, ordinarily must have been made in the regular course of business and as a part of the party's system of keeping his accounts. The fact that the entries are made by clerks in the regular routine of their employment, and under the natural impulse of an employee to perform his duties accurately, is the safeguard of the accuracy of the entry. Indeed, under the systems of bookkeeping in modern business houses, the mechanical precision with which numerous employees record various transactions, together with the absence of any personal motive to misrepresent the facts of the transaction, makes the modern book of accounts a very high form of evidence in respect of transactions that are the proper subject matter for a book of account." Citing many authorities. Notes, 125 Am. St. Rep. 843; 138 Am. St. Rep. 451; 52 L. R. A. 689; 27 L. R. A. 822.

In this case it appears that these books purport to record nearly five years of mutual dealing between the decedent and the complainant; that the books were kept by the double entry method; that the bookkeeper could not have kept her books balanced or her cash and bank account correctly without making these entries; that the account against Mrs. Higginbotham was carried upon the books of the complainant as an asset; and that the largest item on the credit side was for rent of the store in which he was then doing business, which was owned by the decedent. It is claimed with some earnestness that because many of the items charged were not for merchandise of the kind in which the complainant regularly dealt, but were for certain merchandise which he bought from other

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merchants, therefore the entries were not in the regular course of his business. We do not think that the "shop book" rule should be thus limited, or that a merchant's account with his landlord, however he may pay his rent, whether in goods, cash or otherwise, is not an account kept in the regular course of his business. In most of the States it has become the rule to admit entries in books, made in the ordinary course of business at or near the time to which they relate, when authenticated by the oath of the entrant or otherwise. 10 R. C. L., p. 1172.

It is further objected that the rule admitting book accounts does not admit them to prove cash payments, because such items can generally be otherwise proved. Whatever the limitations imposed by this rule, they have little application to this case, because the part of the account we are now considering, from January 1, 1911, to September, 1911, contains only one large cash item and that is the item of $634.50, which was paid by the complainant in satisfaction of a vendor's lien upon certain property of the decedent, which payment was otherwise fully and satisfactorily proved, and the correctness of this charge is acknowledged by the defendant, has been paid since the decree, and is therefore not here involved. It is settled, however, that books of account of banks and bankers are admissible to prove cash advances, loans and other cash items, and this rule has been frequently extended to others where the entries in respect to cash transactions are made in the regular course of business and not merely as casual transactions foreign to the general character of the business conducted by him, as is shown by the note to *Lewis* v. *England*, 2 L. R. A. (N. S.) 401 (14Wyo. 128, 82 Pac. 869). The loan or payment of small sums may be proved by books, upon the ground that they are not within the reason of the general rule, that large cash transactions, out of the ordinary course of business cannot be thus

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proved. *Petit* v. *Teal,* 57 Ga. 145. Where, in the course of business, small sums are passing between the parties, they may with propriety be charged on book, and proved in the same manner as the other items of the account. *Cram* v. *Spear,* 8 Ohio 494; *Hough* v. *Henk,* 8 Ohio Cir. Ct. R. 354.

In *Harmon* v. *Decker,* 41 Ore. 587, 68 Pac. 11, 1111, 93 Am. St. Rep. 748, the rule as to what shall be considered a large sum of money the loan of which cannot be established by a mere production of books of account, was said to be impossible of determination by any fixed standard, and the court in that case said it was not prepared to say that $300 is "a large sum" in the meaning of the general rule. Mr. Justice Moore, recognizing the general rule that large cash loans may not be proved by the parties' account books, says this: "What shall be considered as a large sum of money, the loan of which cannot be established by the mere production of books of account, will probably ever remain problematical. The growth of commercial enterprise must necessarily expand the methods of transacting the business pertaining thereto, including the mode of evidencing such facts, and as courts are not called upon to make, but to enforce, the rules adopted by experience, it would seem to follow that what a few years ago would have been regarded as a large sum of money must now be considered as a mere bagatelle, so that the standard as formerly fixed cannot longer remain as guides of procedure. Admitting that Gasquet was not a banker, and conceding that he was only a general merchant, we are not prepared, nor is it necessary, to say that the sum of three hundred dollars advanced to Karewski, and the smaller sums involved in this appeal, were 'large sums' within the meaning of the rule discussed by the authorities, to which attention is called." Note 138 Am. St. Rep., p. 467; *LeFrance* v. *Hewitt,* 7 Cal. 186; *Beall* v. *Rust,* 68 Ga. 774; *Orcutt* v.

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Hanson, 70 Iowa, 604, 31 N. W. 950; *Wilson* v. *Wilson,* 6 N. J. L. 99; *Tucker* v. *Bradley,* 33 Vt. 328; *Woolsey* v. *Bohn,* 41 Minn. 238, 42 N. W. 1022; 10 R. C. L. 1188; 17 Cyc. 382.

In *Cargill* v. *Atwood,* 18 R. I. 303, 27 Atl. 214, it is held that where the parties have been in the habit of treating cash items, both on the debit and credit side of the account between them, as the proper subject of a book charge, the proof of the loan or advancement of the money on the one side, or payment on account of the same on the other, may be made by the production of the books to the same extent as may proof of the delivery of another article; and whether there has been such a course of dealing between the parties is for the jury to determine.

The relatively small payments of cash involved in the portion of the account now being considered, some of them being apparently in settlement of the accruing rent, and in accordance with the previous custom of the parties, come within the exception to the general rule that cash payments may not be proved by book accounts.

It is also claimed that, in the absence of evidence to the contrary, services and payments made by members of the same family and household to each other are presumed to be gifts. It is sufficient to say as to this contention that the fact that charges were regularly made by the complainant against the decedent and accounts rendered therefor negatives the suggestion that these payments were intended as gifts, and shows clearly that they were not so intended.

There is also criticism or complaint that the commissioner did not seek testimony to sustain the defendant's allegations of indebtedness on the part of complaintant to his decedent. This criticism is not justified. It was the duty of appellant, if he knew of any evidence to sustain his allegations, or to discredit the account of the complainant, to produce it before the commissioner for consideration, or at least to give the names of the witnesses to the commis-

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sioner, so that they might be summoned. Only one inference can be drawn from his failure to do so, and that inference is that no such evidence exists.

The testimony adduced clearly indicates the names of the persons to whom these payments were made, as well as the dates of the several transactions. The bookkeeper testified in a general way that they were made by checks of the complainant to these persons who were either named or indicated, and it is impossible to escape the conclusion that they were so made, because, if not, the obvious means of contradiction were clearly indicated by the evidence. While the testimony is not as clear and as satisfactory as is usual and desirable in such cases, we have no doubt whatever of the correctness of the decree upon the record presented.

Affirmed.

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Richmond.

CALHOUN V. MASSIE.

November 14, 1918.

Absent, Whittle, P.

1. CONSTITUTIONAL LAW—*Vested Rights—Finding of United States Court of Claims—Judgments and Decrees.*—A finding of the court of claims favorable to a claim against the government of the United States for property taken by the federal forces during the late civil war, and the certification of the same to Congress, though authorized by statute, is not a judgment, and creates no vested rights.
2. CONSTITUTIONAL LAW—*Vested Rights—Finding of United States Court of Claims.*—Where there has been a finding of the court of claims in favor of a claim and a certification thereof to Congress, the government had the same right in law to reject the claim in toto, or to attach conditions to its payment when the act of 1915 (omnibus claims act, section 4, 38 Stat. L., page 996) was passed, as it would have had if there had been no statute authorizing the court of claims to consider and report upon the matter. The condition, therefore, incorporated in the act of 1915 limiting the fees of attorneys or agents for services rendered to twenty per cent. of the amount recovered, was not unconstitutional.
3. UNITED STATES—*Claims—Limitation of Attorney's Fee—Case at Bar.*—Defendant by a contract dated April 18, 1911, agreed to pay plaintiff in consideration of his professional services in the prosecution of defendant's claim against the government of the United States for property taken by the federal forces during the late civil war, a sum equal to fifty per cent. of the amount which was collected upon said claim.

   Held: That the contract was void under the omnibus claims act, section 4, 38 Stat. L., p. 996, and this although the services had been rendered by plaintiff and a finding of the court of claims in favor of the claim obtained and a certification thereof to Congress before the omnibus claims act went into effect.

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Error to a judgment of the Circuit Court of Nelson county, in an action of assumpsit. Judgment for defendant. Plaintiff assigns error.

Affirmed.

The opinion states the case.

C. C. Calhoun and *L. Grafton Tucker*, for the plaintiff in error.

Caskie & Caskie, for the defendant in error.

KELLY, J., delivered the opinion of the court.

This writ of error brings under review a judgment of the circuit court sustaining a demurrer to a declaration in assumpsit. The action was based upon the following contract in writing, dated April 18, 1911.

"Fee agreement. This agreement, witnesseth: That I, Bland Massie, of Tyro, Nelson county, Virginia, have employed C. C. Calhoun, of Washington, D. C., as my attorney to represent my claim against the Government of the United States for property taken by the federal forces during the late civil war, and in consideration of his professional services in the prosecution of said claim, I hereby agree and bind my heirs and legal representatives, to pay to him, his heirs or legal representatives, as a fee a sum equal to 50 per cent. of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim."

The declaration, after setting out the contract, made the following material allegations: That the plaintiff, C. C. Calhoun, faithfully and efficiently performed the work required of him by the contract; that he successfully prosecuted the claim of the defendant, Bland Massie, before the

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court of claims of the United States, involving extensive and varied legal services set out in detail in the declaration; that as a result of these services the court of claims found in favor of the claim to the amount of $1,900; that this finding was approved by Congress and an appropriation made to pay the claim; that the same was paid to the defendant by a treasury warrant, less twenty per cent. which was paid by a like warrant to the plaintiff on account of his fee and accepted by him without waiving his rights under the contract to fifty per cent. of the amount; that thus far he has only received twenty per cent. of the sum collected; and that thirty per cent. thereof is still wholly unpaid and due to him by the defendant.

The declaration then proceeds to set out that subsequent to the execution of the contract, subsequent to the performance of the plaintiff's services thereunder, and subsequent to the finding of the court of claims and the certification thereof to Congress, an act, commonly known as the "Omnibus Claims Act," was passed by Congress, approved March 4, 1915, entitled "An act making appropriations for payment of certain claims in accordance with findings of the court of claims, reported under the provisions of the acts approved March 3, 1883, and March 3, 1887, and commonly known as the Bowman and Tucker acts, and under the provisions of section 151 of the acts approved March 3, 1911, commonly known as the Judicial Code" (38 Stat. L., p. 962); and that this act, which included the defendant's claim, contained a provision (38 Stat. L., p. 996), limiting fees of attorneys for claimants to twenty per cent. of the amount of the claims as allowed and directed to be paid, said twenty per cent. to be in full of all demands for services rendered by attorneys in behalf of claimants.

The declaration concludes with the following averment or proposition, which raises the only really controverted question presented for our decision, to-wit: "That the act

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of Congress, omnibus claims act, sec. 4, 38 Stat. L., p. 996, is null and void and unconstitutional and of no force and effect insofar and to the extent it may undertake to fix and regulate the amount of fee should be paid to the plaintiff as attorney for the claimant, the defendant, which he had earned under a written agreement with the defendant, and which agreement was executed and services performed thereunder prior to the passage of said act, which agreement specified there should be paid to the plaintiff the sum of fifty per cent. of the amount of the claim collected. * *"

Several grounds were assigned for the demurrer to the declaration, but the one which stated more directly than any of the others the ground chiefly relied upon was, "that the appropriation made by Congress to pay said claim was conditioned upon the application of a certain sum and no more, to the plaintiff." If section 4 of the act was constitutional and valid, this ground was well taken, and the demurrer was properly sustained.

The record before us does not contain a copy of the order entered by the court of claims, but merely shows by an averment in the declaration that there was a finding by that court favorable to the claim, and that the same was certified to Congress. The court of claims had no jurisdiction to go further in hearing and determining the claim, and manifestly did not undertake to go further, than to ascertain and report the same to Congress, "together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any legally or equitably due from the United States to the claimant, etc." (2 U. S. Comp. Stat., p. 1468, sec. 1136, sub-sec. 1; *Id.* p. 1499, sec. 1142. Whether the claim would be paid or not, and upon what conditions, still remained a question which depended absolutely upon the will and action of Congress. Whatever

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legislative recognition had theretofore been given by Congress to the proceedings under which the claim had, up to that time, been prosecuted, nothing had been done to confer upon either Massie or Calhoun any such rights as would thereafter disable that body from imposing any conditions which it might see fit to impose with reference to the payment of the claim. Mr. Justice Van Devanter, in *Gritts* v. *Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, referring to a contention that a certain act of Congress was unconstitutional and void, because it impaired rights vested by a former act dealing with the same subject, said: "No doubt such was the purport of the act, but that, in our opinion, did not confer upon them (certain members of an Indian tribe) any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution. The difficulty with the appellant's contention is that it treats the act of 1892 as a contract, when it is only an act of Congress, and can have no greater effect." It is true that Mr. Justice Van Devanter was here discussing a controversy involving Indian tribal property, as to which the United States Government possesses peculiar and plenary administrative power. But the principle involved in that case and in this one is the same, namely, that until Congress had taken some such action as to confer vested rights on the parties, the subject remained within its exclusive power and control. The finding of the court of claims, though authorized by statute, is not a judgment, and creates no vested rights. 2 U. S. Comp. Stat. sec. 1142, p. 1506, note 14. The statute authorizing the proceeding in that court confers no new right, save that of making the United States a defendant in a judicial tribunal. 2 U. S. Comp. Stat., sec. 1142, p. 1500, note 1.

In *Beers* v. *Arkansas*, 61 U. S. (20 How.) 527, 529, 15 L. Ed. 991, Chief Justice Taney said: "It is an established

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principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, *and may withdraw its consent whenever it may suppose that justice to the public requires it.*" (Italics added).

We think there can be no sort of question that the government had the same right in law to reject the claim *in toto*, or to attach conditions to its payment when the act of 1915 was passed, as it would have had if there had been no statute authorizing the court of claims to consider and report upon the matter. The condition, therefore, which was incorporated in that act is plainly conclusive of this case. That condition was as follows:

"That no part of the amount of any item appropriated in the bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered or advances made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000.00."

It was, as we have seen, only by virtue of the act of 1915 that the claim became collectible at all, and by its pro-

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visions, therefore, the rights of both Massie and his counsel are determined. The act by its terms precludes any contention that the contract sued on in this case could be made to impose a personal obligation on Massie to pay from funds derived from some independent source more than twenty per cent. of the amount of the claim. The language of the enactment indicates a purpose to forestall any such evasion of its purpose, and to that end not only makes it unlawful to pay or receive as a fee more than twenty per cent. of the funds actually appropriated and paid under the act, but also makes it unlawful "for any agent or agents, attorney or attorneys, to accept, collect, withhold or receive any sum which in the aggregate exceeds twenty per cent. of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, *any contract to the contrary notwithstanding.*"

The judgment of the lower court seems to us, therefore, clearly right, independent of authority; but we do not think that the case, insofar as the fundamental and controlling principles which must be applied in its decision are concerned, can be distinguished from the case of *Ball* v. *Halsell,* 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622. It is true that in the *Ball Case,* by the terms of the contract the attorney was to be paid out of the funds recovered and received by him from the United States, and thus contravened the plain terms of the statute involved in that decision. But we have already seen that the contract in the case at bar likewise contravenes a statute which in terms prohibits the payment or receipt as a fee *from any source of an amount in excess of twenty per cent.* of the claim as allowed. It is also true that in the *Ball Case,* the contract for the fee was invalid at the time of its execution, while in the instant case, it only became so by reason of the condition imposed by the subsequent act. This, and other differences which might be ad-

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verted to, between the *Ball Case* and the instant case, are circumstantial merely, and cannot be made to differentiate the cases in any substantial respect. Mr. Justice Gray, delivering the opinion of the court, said: "Although he (Ball) prosecuted the claim before the Department of the Interior, and that department recommended payment of a certain sum upon the claim, yet before that sum had been paid, or Congress had made any appropriation for its payment, and, therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract now sued on, Congress passed the act of March 3, 1891, chap. 358.

"By this act, as already stated, Congress, while giving to the court of claims jurisdiction and authority to inquire into and finally adjudicate certain claims arising from Indian depredations, including such as had been examined and allowed by the Department of the Interior, not only declared void all sales, transfers or assignments of such claims, theretofore or thereafter made—except in the administration of the estates of deceased persons—and all contracts theretofore made for fees and allowances to claimant's attorneys, but expressly provided that all treasury warrants in payment of the judgments of the court should be made payable and be delivered only to the claimant, or to his heirs, executors or administrators, except so much thereof as the court, at the time of rendering the judgment, and as part thereof, should allow to be paid directly to the claimant's attorney, not exceeding in any case 20 per cent. of the amount recovered.

"In view of previous experience, this last provision was a wise, reasonable and just provision for the protection of suitors and it was clearly within the constitutional power of Congress."

The principles and authorities which we have discussed seem to us so absolutely conclusive of the controversy that

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we deem it unnecessary to further prolong this discussion. We were referred to a number of authorities which to a greater or less degree support the contention of the plaintiff in error. See in particular *Moyers* v. *Memphis*, 135 Tenn. 263, 186 S. W. 105, Ann. Cas. 1918c, 854; *Newman* v. *Moyers*, 47 D. C. App. 102, 45 Wash. L. Rep. 771; *Black* v. *O'Hara*, 175 Ky. 623, 194 S. W. 811; *Lay* v. *Lay*, (Miss.) 79 So. 291. With reference to these apparently adverse decisions, we deem it sufficient to say that insofar as they are not distinguishable from the present case, we think they are in conflict with the better reason, as well as with the higher authority, of *Ball* v. *Halsell*, *supra*. A more persuasive State court decision is found in *Ralston* v. *Dunaway*, 123 Ark. 12, 184 S. W. 425, Ann. Cas. 1918c, 870, where the Supreme Court of Arkansas, upon substantially the identical question before us, follows *Ball* v. *Halsell*, and reaches the conclusion arrived at by us in this case.

The question involved in this case of course is purely one of law, and it is not perhaps incumbent upon us to say anything in defense of the attitude of the defendant in error.

Inasmuch, however, as a very strong appeal was made to us in the oral argument of this case, based upon the alleged natural equity of the plaintiff's claim and the apparent bad faith of the defendant in declining to comply with the plain terms of his written contract, it seems not inappropriate to say that if our conclusion as to the law of this case is right, there is no way by which the defendant could lawfully perform the contract to any greater extent than it has already been performed on his part. Neither he nor his counsel could have dealt with the fund otherwise than as provided for in the appropriation act without becoming liable to the penalty therein prescribed.

We are of opinion that there was no error in the judgment complained of, and the same must be affirmed.

Affirmed.

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Richmond.

CITY OF CHARLOTTESVILLE v. JONES.

November 14, 1918.

1. BRIDGES—*Municipal Corporations—Duty of City.*—It is the duty of a city to use reasonable care to keep and maintain a bridge, which forms part of one of the city streets, in good and sufficient repair to render it reasonably safe for all persons exercising ordinary care and prudence in passing on or over it.
2. BRIDGES—*Municipal Corporations—Duty of City—Hand-Rail.*—In the instant case, there had been a hand-rail on the north side of the bridge for many years, as was known to the plaintiff, but for about three weeks prior to and at the time of the accident, unknown to the plaintiff, such hand-rail was absent.

   Held: That the fact that the defendant city allowed the hand-rail to remain off the bridge for this period, without any excuse being shown therefor, was sufficient evidence to warrant the jury in finding the city guilty of negligent breach of its duty, and the verdict of the jury for the plaintiff, therefore, concluded that question.
3. BRIDGES—*Injury to Pedestrian—Proximate Cause—Case at Bar.*—In the case at bar, the evidence established that the negligence of the city in not providing a hand-rail on one side of the bridge was the proximate cause of plaintiff's injury, while plaintiff was not guilty of contributory negligence.
4. BRIDGES—*Injury to Pedestrian—Contributory Negligence—Conclusiveness of Verdict of Jury.*—Where plaintiff brought his action for injuries sustained by stepping from a bridge at night owing to the absence of a hand-rail, the determination of the question of whether plaintiff was guilty of contributory negligence in not observing his nearness to the edge of the bridge and the absence of the hand-rail and in walking off the bridge as he did, depended upon the determination of the controverted question of fact as to what was the condition of light or darkness upon the bridge at the time of the accident. There being a conflict in the testimony on this subject, ordinarily the verdict of the jury would admittedly conclude the question.
5. BRIDGES—*Injury to Pedestrian—Contributory Negligence—Conclusiveness of Verdict of Jury—Incredible Facts.*—But in the

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case at bar the city invoked against the verdict of the jury the well-established rule that "courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible," and contended that as there was a 500 candle power arc light located at from 100 to 210 feet from the point of the accident behind the plaintiff as he went upon the bridge, that the Supreme Court of Appeals should take judicial notice of the fact that the testimony of the plaintiff was incredible, when he stated that it was so dark that he did not know that he was at the northern edge of the bridge.

Held: That the position of the city ignored the facts that the night was damp and cloudy, that plaintiff as he came upon the bridge was faced with a light which shone into his eyes and that the arc light was behind the plaintiff, all of which facts were for the consideration of the jury, and which they, having viewed the scene of the accident under conditions nearly alike those which existed on the night of the accident, were in a better position than the Supreme Court of Appeals to weigh and consider. This was not a case where an admitted fact, or the testimony for a party to the cause, disclosed a physical fact which is irreconcilable with some position taken in another part or parts of such testimony.

6. BRIDGES—*Injury to Pedestrian—Instructions.*—In an action for injuries sustained by a pedestrian when he fell from a bridge owing to the absence of a hand-rail, an instruction that the city was "bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons exercising ordinary care and prudence, passing on or over the same, and if the jury believe from the evidence that the defendant, the city of Charlottesville, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair and that the injury complained of resulted from that cause," they should find for plaintiff, is not defective in the use of the word "all" as descriptive of the "reasonable care and precaution," which the instruction mentions.

7. BRIDGES—*Contributory Negligence—Prior Knowledge of Locality.*—In an action for injuries caused by a fall from a bridge, the court instructed that if the jury believed that the injury complained of resulted from a failure of the city to use reasonable care and precaution to keep its bridges and sidewalks in good and sufficient repair, and that the plaintiff sustained damage thereby, whilst exercising such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence, then plaintiff was entitled to recover.

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Held: That this instruction was not erroneous in that it allowed the jury to ignore the prior knowledge of the plaintiff of the situation and permitted the plaintiff to recover as if he were in the position of an ideal man exercising reasonable care and prudence, who is referred to in this instruction, although such ideal man may have had no prior knowledge of the situation. The words, "under the circumstances," confined the jury to the consideration of the instant case in which there was no dispute that the plaintiff had prior knowledge of the locality. Whether he had prior knowledge of the defect in the bridge—the absence of the hand-rail—which rendered the crossing of the bridge in the night time dangerous, was a question for the jury and was or was not one of the "circumstances" in the case as they might find to be the fact.

8. BRIDGES—*Injury to Pedestrian—Instructions—Instruction Cured by Other Instruction.*—In an action against the city for injuries incurred by a pedestrian in a fall from a bridge, an instruction that where a railing on the side of a bridge upon one of the streets of a city is necessary for the safety of travelers, the want of such railing is a defect in the highway for which the city is liable, is not erroneous as imposing upon the city an absolute duty to provide all things necessary for the safety of travelers, where when read together with another instruction there could have been no misconception of it by the jury.

9. ASSIGNMENTS OF ERROR—*Consideration—Points not Raised by Assignments—Instructions.*—Where an instruction is not free from all exception, but is not open to the objection urged against it in the assignments of error, the objection made in the assignments of error is the only objection which the Supreme Court of Appeals will consider.

10. BRIDGES — *Instructions — Instructions Read Together.*—In an action for injury to a pedestrian who fell from a bridge, an instruction that if the jury believed that the plaintiff had been permanently injured by reason of the accident he had the right to recover prospective as well as past damages, is not erroneous because the scope of the jury's inquiry in ascertaining prospective damages was in no way defined, where another instruction directed that if the jury should find for the plaintiff they might take into consideration any bodily injuries which he might have sustained and any physical pain he might have suffered.

11. CONTRIBUTORY NEGLIGENCE—*Instructions—Instructions Read Together.*—In an action against a city for injuries sustained from falling from a bridge defendant requested the court to instruct the jury that while the burden of proof of contributory negligence is in general upon the defendant, yet if the plaintiff's evidence discloses his own contributory negligence or it may be

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inferred from all the circumstances in the case, it bars his recovery no matter where the burden rests. The court modified this instruction and it was claimed by defendant that as modified the instruction failed to tell the jury that contributory negligence barred recovery and left defendant with no *general* instruction on that point.

Held: That there was no merit in this contention, as the court gave other instructions, not *general* instructions it is true, but specific instructions having reference to all the evidence in the case on which the defendant relied, or could rely, to show contributory negligence of the plaintiff, and which specifically told the jury that if they found certain facts that the plaintiff was guilty of contributory negligence and could not recover. Hence, the giving of a general and abstract instruction on the subject of contributory negligence was unnecessary.

12. BRIDGES—*Hand-Rail—Instructions.*—In an action against a city by a pedestrian for injuries sustained from a fall from an unguarded bridge, defendant requested an instruction that if the jury believe that it was obvious to a reasonable man that the rail on the bridge referred to in the evidence was missing then it became the duty of the plaintiff to look out for and guard against the occurrence of any accident to him at that point. The court modified this instruction by inserting the words "if he knew or ought to have known of this" after the word "plaintiff."

Held: That these words were properly inserted.

13. BRIDGES—*Instructions—Age and Activity of Party Injured—Contributory Negligence.*—In an action for injuries against a city occasioned by a fall from a bridge, defendant asked for an instruction that the old age of the plaintiff did not relieve him of his duty to use ordinary care in passing along the streets, but if by old age his activity has been impaired, that fact imposes upon him the duty of using greater precaution than he would otherwise have to use.

Held: That as there was no evidence in the case tending to show that any want of activity on the part of the plaintiff contributed to the accident, it was not error to refuse the instruction. Even if there had been such evidence it might have been error to have given such instruction, because it was upon the subject of the weight of evidence and singled out and emphasized one circumstance which should have been considered by the jury along with all the other circumstances in the case. That it embodied a correct abstract statement of the law did not make it a proper instruction to the jury. Other instructions in the case left no room for the jury to entertain the view that old age, or anything else, relieved the plaintiff of the duty to exercise ordinary care.

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14. CONTRIBUTORY NEGLIGENCE—*Inattention or Forgetfulness.*—The general rule is, that inattention to or forgetfulness of a well-known danger or peril will not excuse a failure to avoid it.

15. CONTRIBUTORY NEGLIGENCE—*Inattention or Forgetfulness.*—But where no question of the assumption of risk is involved, but only a question of contributory negligence (as in the instant case), on principle, inattention or failure of memory would not be contributory negligence, if under all the circumstances of the case it was legally excusable. And it is so excusable under certain circumstances, as is expressly held by the authorities—as where the plaintiff has his attention diverted by such a cause, or causes, as would ordinarily induce such forgetfulness or inattention in an ordinarily prudent or careful person in the same or in a similar situation. And there are other circumstances which may take a case of lapse of memory or lack of attention from under the operation of the general rule mentioned.

16. CONTRIBUTORY NEGLIGENCE—*Inattention or Forgetfulness.*—The inquiry concerning whether a failure of memory, or inattention, is such contributory negligence on the part of a plaintiff as will bar his recovery, is not different, in legal principle, or in practical application, from the inquiry as to whether any other act of the plaintiff constitutes such negligence, and it is to be measured by the same standard applicable to all other acts thus drawn in question, namely, by the standard of the action of the ideal man, which has been fixed upon by the law, to-wit, the action of the ordinarily prudent or careful person under the same or similar circumstances.

17. CONTRIBUTORY NEGLIGENCE—*Inattention or Forgetfulness—Instructions.*—An instruction in an action for injuries caused by a fall from a bridge, due to the absence of a hand-rail, which, in effect, told the jury that there could be no legal excuse for a failure of memory, or for inattention, to a once known fact, would be error. In the instant case it was a question of fact for the jury to determine whether the plaintiff was negligent in his inattention to or forgetfulness of the absence of the hand-rail, if they believed from the evidence that he had prior knowledge of its absence.

Error to a judgment of the Corporation Court of city of Charlottesville. Judgment for plaintiff. Defendant assigns error.

Affirmed.

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In this action the defendant in error, who was plaintiff in the court below (and will be hereinafter referred to as plaintiff), obtained in such court a verdict and judgment thereon for damages for injuries sustained in falling from a bridge which constituted a part of one of the streets of the defendant city.

The gravamen of the action is that there was no hand-rail on the north side of the bridge. The absence of such hand-rail is alleged to have been the proximate cause of the plaintiff's injury.

There were two main issues, (1) whether the city was guilty of negligence, which was the proximate cause of the plaintiff's injury, in not providing such hand-rail at the time of the accident; and if so, (2) whether the plaintiff was guilty of contributory negligence which would bar his recovery.

THE MATERIAL FACTS.

Regarding the evidence as we must do under the statutory rule on the subject, the following are considered the material facts of the case:

The accident occurred after nightfall about 8:15 P. M. on February 25, 1916. The bridge crosses a small stream. The width of the bridge from side to side was thirty-two feet ("as wide as the street," according to the testimony of one of defendant's witnesses, which is supposed to refer to the used portion of the street), while the span or length of it was only twelve feet. The bridge is a part of Garrett street, which runs approximately east and west. It is located within, but near the corporate limits of said city, being about thirty-five feet west of the Scottsville road, into which Garrett street, at its eastern end, enters. The Scottsville road passes obliquely across the eastern end of Garrett street.

Garrett street, from about the western end of the bridge

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to the Scottsville road, is not straight, but turns slightly to the southward from that point and curves in that direction to its junction with the Scottsville road; so that the bridge itself is curved, "cattercornered" or "skow-wowed," as described by witnesses, causing it to curve southward from the western to the eastern end of the bridge. That is to say, a traveler walking from the said city along Garrett street toward the Scottsville road, having entered upon the bridge near its northern side, if he continued straight ahead, in the absence of a hand-rail to divert his progress, would walk off the northeastern corner of the bridge into the channel of the stream below.

There had been a hand-rail on the north side of the bridge for many years, as was known to the plaintiff, but for about three weeks prior to and at the time of the accident, unknown to the plaintiff, such hand-rail was absent.

The plaintiff was familiar with the bridge and its curved shape, having crossed it numerous times. He was walking from the city along Garrett street toward the Scottsville road when the accident occurred. It had recently rained and he was walking along the northern edge of the street to keep out of the mud. The western end of the bridge was covered with dirt, washed down-hill from the unpaved street by rains from time to time, to about midway of the bridge which deadened the sound of plaintiff's feet upon it so that he did not know that he was on the bridge until he passed over the dirt covered part of it and was nearly over it. When he then realized that he was on the bridge, he testifies that, "It was * * a very dark night * * dark of the moon and very cloudy * *. It was so intensely dark that I couldn't see anything, only the light in front of me where the light shone out of the window" (of Jack Allen's store). * * "I didn't know that I was at the edge of the bridge. * * there was a path that led right from Jack Allen's store and on the inside" (of the store)

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"there was a light from the window that sort of misled me and caused me to step off, I stepped off with my right foot. I was going along the side and stepped off with that foot (indicating right foot) and as I went down I grabbed that post in the corner and it kept me from falling in the water. * * I found I was on the bridge and saw that path on the opposite side. I could see that from the lights in Jack's store and that is what led me off of it. * * I was as careful as I could be. I couldn't have wanted to step off there. I didn't do it purposely I am sure. Q. What did you do to guard yourself from that? A. Why, as I tell you, I started, after I had taken one or two steps, and found I was on the bridge, I struck for this path. You can take the jury down there and show it to them. * * If I had known the hand-rail was off, chances are that I would have kept further in the middle of the street, but I didn't know it was off. * * If there had been a hand-rail there I wouldn't have gone off. As I had the situation in mind I knew I was on the bridge and I know there was a hand-rail there and I started for that path after I saw it and I knew there had been a hand-rail there and I made for that path as I told you. Q. And you knew the path was clear off the line of the street? A. No, sir. Q. You knew if the hand-rail had been there you couldn't have gotten to that path? A. I couldn't have gotten to the inside of it if it had been there and if it had been there I would have had to follow the bridge, but as it was I stepped right out at the far corner of the bridge right among a lot of rocks. Q. And if you had gone a little to the right of the post you never would have stepped off? A. No, if I had gone, I don't suppose if I had gone two feet further to the right I would have stepped off the bridge as I did. * * I couldn't see. I didn't know that I was at the edge of the bridge."

There was testimony to show that the plaintiff by passing near and over the bridge recently prior to the accident had

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the opportunity of observing the absence of the hand-rail; but he testified positively that he had not observed such absence and thought it was there.

As to whether he thought of the hand-rail at all at the very time of the accident, the plaintiff testified, "Really, I can't say I was thinking about the hand-rail. * * I was looking for a good place to step."

Jack Allen's store fronted towards the bridge, but the store front was some four to twelve feet north of the northeastern corner of the birdge, as variously estimated by witnesses for plaintiff, and a path extended from the front of the store to a point within a few feet of the north side of the bridge, near its northeastern corner, and passed thence along parallel with the northern side of the bridge to and around the eastern side of a post, which stood at the northeastern corner of the bridge, and thence into Garrett street, at such corner of the bridge. The point at which the plaintiff stepped off the bridge and fell, was between the bridge side and the angle of the path aforesaid, where it turned, within a few feet of the northern side of the bridge, and passed thence towards the post as aforesaid. There was an opening between this turn of the path and the bridge-side, with which the plaintiff was familiar and across which he had seen children jump from the path to the bridge, prior to his accident. But he testified that it was so dark that at the time of the accident he could not see the path at that turn, and that he could see that portion of the path only which was up near the front of Jack Allen's store, and that locating his position relative to the path as he saw that portion of it, he mistook his location and so stepped off the bridge, when he thought he was stepping on the path where it passed around the east side of the post and there reached the bridge. In other words, he thought he had reached and was upon the eastern end of the bridge, and had but to step upon the path thereat, when in fact he lacked a few feet of having reached that point on the bridge.

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There is a sharp conflict in the evidence for plaintiff and for the city, as to the amount of light upon the bridge at the time of the accident. The testimony for the city is to the effect that there was a standard arc-light, of 500 candle power, which hung in the centre of Garrett street at the intersection of Fifth street therewith, a point variously estimated by the witnesses as from "a block" (210 feet) as estimated by one of plaintiff's witnesses, or 175 ft. or 150 ft., or 152 ft. to 100 feet, as estimated by witnesses for the city, west of the bridge which shone upon the bridge and so lighted it, even in the absence of any electric light on the corner of Jack Allen's store, that a traveler upon it could see to pick up a match or other small object, lying on it; which, if true as of the night of the accident, would have made the northern side of the bridge and the absence of the hand-rail readily and perfectly apparent to the plaintiff. There was also testimony for the city, to the effect that there was an electric light on a bracket at the corner of Jack Allen's store. There was also such testimony tending to show that that electric light was lighted at the time of the accident and also shone upon the bridge.

The plaintiff, however, and one of his witnesses, testified positively that the electric light on the corner of the said store was not lighted at the time of the accident. Plaintiff and one of his witnesses also testified to the character of the night, being without moon, cloudy, with some rain, and very dark, so that plaintiff could not see where he was on the bridge when he got upon it and was unable to observe the northern edge of the bridge or the absence of the hand-rail. And the witnesses for the city, who testified to the effect of the arc-light in lighting the bridge, did so, for the most part, from their observation of it a few nights before the trial of the case, when they visited the scene of the accident for the purpose of seeing how much they could see upon the bridge by aid of the arc-light aforesaid, and they

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testified, in substance, that while there was no moon, the night on which they made such observation was a starry night, unusually bright and clear. The other witnesses for the city who testified to the light on the bridge observed on other occasions were not so definite as to the brightness of the light there. Moreover, the testimony does not show that any of these witnesses made their observation by approaching the bridge and going upon it with their back to the arc-light and with the light from Allen's store window shining in front of them, as was the case with plaintiff at the time of the accident.

There was a view by the jury on a cloudy night, the jury having expressed a desire to view the scene of said accident under the same conditions as nearly as posible and at the same time of night, that the accident took place, such a view was had.

The action of the court below in giving and refusing instructions was as follows:

The court gave the following instructions at the request of the plaintiff (with certain modifications not needful to be noted here):

Plaintiff's Instruction No. 1.

"The court instructs the jury that the defendant, the city of Charlottesville, is bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons exercising ordinary care and prudence, passing on or over the same, and if the jury believe from the evidence that the defendant, the city of Charlottesville, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sus-

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tained damage thereby, whilst exercising such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence, then he is entitled to recover of the defendant in this suit such an amount as the jury may ascertain from the evidence, not exceeding five thousand dollars."

Plaintiff's Instruction No. 2.

"The court instructs the jury that where a railing on the side of a bridge upon one of the streets of a city is necessary for the safety of travelers, the want of such railing is a defect in the highway for which the city is liable, and whether a railing was necessary at the point where the plaintiff was injured, is a question for the jury to determine, and if they believe from the evidence that such a railing was necessary on the side of the bridge at which the said plaintiff was injured and that the accident to the said plaintiff was caused by the failure to have such a railing, then they must find for the plaintiff and assess his damages at such an amount as they may deem he is entitled to from the evidence, not exceeding five thousand dollars, provided plaintiff exercised due care for his own protection."

Plaintiff's Instruction No. 4.

"The court instructs the jury that if they find for the plaintiff, in estimating his damages they may take into consideration any bodily injuries which he may have sustained by reason of the accident complained of, and any physical pain he may have suffered thereby, and assess his damages at such a sum as they may think just and proper under the evidence in this case, not exceeding the sum of $5,000.00 claimed in the declaration."

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Plaintiff's Instruction No. 5.

"The court further instructs the jury that if they believe from the evidence that the plaintiff in this cause has been permanently injured by reason of the accident complained of, he has the right to recover prospective as well as past damages, not exceeding five thousand dollars, the amount claimed in the declaration."

Plaintiff's Instruction No. 6.

"The court instructs the jury that where a hand-rail has been upon a bridge within the city limits and kept up by the city a passenger who has known of the existence of that hand-rail and who did not know that it was missing, has a right to depend upon his knowledge of the previous existence of this hand-rail in crossing the bridge, unless he knows, or by the exercise of reasonable care might have known, that it was missing."

The giving of numbers (1), (2) and (5) of such instructions is assigned by the defendant city as error.

The following were the instructions offered by the defendant city and the action of the court thereon.

Defendant's Instruction No. 1.

"The court instructs the jury that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant failed to exercise reasonable care to keep the bridge referred to in the evidence in a reasonably safe condition and that such failure was the proximate cause of the plaintiff's injury and unless he has sustained that burden they, the jury, shall find for the defendant."

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Defendant's Instruction No. 2.

"The court instructs the jury that the law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. The corporation is not required to have its streets so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty is only to use reasonable care to see that its streets are reasonably safe for persons exercising ordinary care and prudence."

Defendant's Instruction No. 3.

"The court instructs the jury that while the burden of proof of contributory negligence is in general upon the defendant yet if the plaintiff's evidence discloses his own contributory negligence or it may be inferred from all the circumstances in the case, it bars his recovery no matter where the burden rests. *City of Winchester* v. *Carroll,* 99 Va. 737, 40 S. E. 37."

Defendant's Instruction No. 4.

"The court instructs the jury that it was the duty of the plaintiff to exercise ordinary care to prevent any injury whatever to himself and he was guilty of contributory negligence if he was himself the author of any part of the injury of which he now complains, or if by the exercise of reasonable care upon his part, he could have avoided the consequences of the negligence ascribed to the defendant, and if the jury shall so believe they shall find for the defendant. *Watkins* v. *Danville,* 97 Va. 713, 34 S. E. 884."

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Defendant's Instruction No. 5.

"The court instructs the jury that where it is apparent and obvious that the street is dangerous then travelers along such street are under obligation to observe the dangers therein and to give to their passage along such streets greater care and observation than would otherwise be necessary, and if the jury believe that it was obvious to a reasonable man that the rail on the bridge referred to in the evidence was missing then it became the duty of the plaintiff to look out for and guard against the occurrence of any accident to him at that point, and if the jury believe he did not do so, they, the jury, should find for the defendant."

Defendant's Instruction No. 6.

"The court instructs the jury that while travelers along the public streets are not bound to keep their eyes at every moment upon the street, they are bound to exercise reasonable and ordinary care to avoid danger and if the jury believe that the condition of the bridge referred to in the evidence was such that an ordinarily prudent man would have realized the necessity of care to avoid injury to himself, and that the plaintiff failed to observe necessary precautions to avoid injury, then, even though the city was negligent, he was guilty of contributory negligence and cannot recover."

Defendant's Instruction No. 7.

"The court instructs the jury that although they may believe the street at the point where the plaintiff fell was dangerous, yet if they believe from the evidence that the south side of the bridge referred to in the evidence, was

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reasonably safe, and that an ordinarily prudent man exercising ordinary care under the circumstances would have observed that the rail on the north side of the bridge was off, and would not have gone there, then it was the duty of the plaintiff to avoid the north side and if he did not do so, he cannot recover."

Defendant's Instruction No. 8.

"The court instructs the jury that old age of the plaintiff did not relieve him of his duty to use ordinary care in passing along the streets, but if by old age his activity has been impaired, that fact imposes upon him the duty of using greater precaution than he would otherwise have to use."

Defendant's Instruction No. 9.

"Negligence as used in the instructions is want of ordinary care. And the care, which is ordinary care, varies according to circumstances. The care which under certain conditions is sufficient to be ordinary care, under other conditions may not be sufficient. Greater caution is demanded on the part of the plaintiff according as the circumstances demanded greater caution. He is bound to use only ordinary care, but he is bound to use such ordinary care, and ordinary care is that care which a man of ordinary prudence would use under all the circumstances proved in the case."

Defendant's Instruction No. 10.

"The court instructs the jury that a person using a street known to him to be defective and on that account dangerous, is bound to use care commensurate with the known

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danger, and if the jury believe from the evidence that the plaintiff knew that the rail at the north side of the bridge in question was missing, and failed in passing over the bridge to use such care as a person of ordinary prudence would have used under the circumstances, they, the jury, must find for the defendant."

Defendant's Instruction No. 11.

"The court instructs the jury that if they believe from the evidence that the plaintiff knew that there was no rail or barrier along the bridge referred to, but failed at the time of the accident to remember such fact, and fell through inattention, they must find for the defendant. 99 Va. 734 40 S. E. 37."

Thereupon the court gave instructions marked defendant's instructions Nos. 1, 2, 6, 9 and 10, but refused to give defendant's instructions marked Nos. 3, 4, 5, 7 and 8 and 11. And the court gave in lieu of instruction No. 3, an instruction reading as follows:

Defendant's Instruction No. 3. (*Modified.*)

"The court instructs the jury that the burden of proving the defendant guilty of negligence rests upon the plaintiff and that if the defendant seeks to relieve itself of liability by reason of the plaintiff having been guilty of contributory negligence, the burden of proving such contributory negligence rests upon the defendant unless such contributory negligence was disclosed by the plaintiff's evidence, or would be fairly inferred from the circumstances."

And modified instructions Nos. 5 and 7 and 11 so as to read as follows:

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Defendant's Instruction No. 5. (*Modified.*)

"The court instructs the jury that where it is apparent and obvious that the street is dangerous then travelers along such street are under obligation to observe the dangers therein and to give to their passage along such streets greater care and observation than would otherwise be necessary, and if the jury believe that it was obvious to a reasonable man that the rail on the bridge referred to in the evidence was missing then it became the duty of the plaintiff if he knew or ought to have known of this, to look out for and guard against the occurrence of any accident from the want of such rail, and if the jury believe he did not do so, they, the jury, should find for the defendant."

Defendant's Instruction No. 7. (*Modified.*)

"The court instructs the jury that although they may believe the street at the point where the plaintiff fell was dangerous, yet if they believe from the evidence that the south side of the bridge referred to in the evidence was reasonably safe, and that an ordinarily prudent man exercising ordinary care under all the circumstances would have observed that the rail on the north side of the bridge was off, and would not have gone there, then it was the duty of the plaintiff to avoid the north side, if he knew or by exercise of ordinary care might have known it was dangerous, and if he did not do so, he cannot recover."

Defendant's Instruction No. 11. (*Modified.*)

"The court instructs the jury that if they believe from the evidence that the plaintiff knew that there was no rail or barrier along the bridge referred to, but failed at the time of the accident to remember such fact, and fell through

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inattention, they must find for the defendant, provided an ordinarily prudent person under similar circumstances should have remembered it."

The refusing of defendant's instructions numbers (3) and (4) and the refusing to give as offered and the modifying defendant's instructions numbers (5), (7) and (11), are assigned as error by said city.

Further: There was a motion of the city to set aside the verdict of the jury as contrary to the law and the evidence, which was over-ruled by the trial court, and that is the remaining assignment of error by said city.

Allen & Walsh, for the plaintiff in error.

Duke & Duke, for the defendant in error.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The assignments of error raise the questions which will be passed upon in their order as stated below.

1. Was the city guilty of such negligence in not providing a hand-rail on the northern side of the bridge that it was liable in damages to the plaintiff for his injury, if such negligence was the proximate cause thereof?

The duty of the city in the premises was to use reasonable care to keep and maintain the bridge in good and sufficient repair to render it reasonably safe for all persons exercising ordinary care and prudence in passing on or over it. The question of fact as to whether the city has discharged that duty was submitted to the jury by plaintiff's instruction No. 1, above quoted. The fact that the defendant city allowed the hand-rail to remain off the bridge for a period of about three weeks before the accident, without any excuse being shown therefor, was suf-

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ficient evidence to warrant the jury in finding the city guilty of negligent breach of its duty aforesaid. The verdict of the jury, therefore, concluded the question we have under consideration in the affirmative.

2. Was the negligence of the city aforesaid the proximate cause of the injury aforesaid?

From the statement of facts preceding this opinion it is manifest that this question must be answered in the affirmative, unless the plaintiff was guilty of contributory negligence, which would bar his recovery. This brings us to the consideration of the main controverted question in the case upon the facts, namely:

3. Was the plaintiff guilty of contributory negligence in not observing his nearness to the northern edge or side of the bridge and the absence of the hand-rail and in his walking off the bridge as he did?

The determination of this question depends, of course, upon the determination of the controverted question of fact as to what was the condition of light or darkness upon the bridge at the time of the accident. There being a conflict in the testimony on this subject, as shown in the above statement of facts, ordinarily the verdict of the jury would admittedly conclude the question. The city, however, invokes against such a conclusion the well established rule that "courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible;" and the following cases are cited on the point. *N. & W. Ry.* v. *Strickler,* 118 Va. 153, 155, 86 S. E. 824; *Mitchell* v. *So. Ry. Co.,* 118 Va. 643, 647, 88 S. E. 56; *Va. I. C. & C. Co.* v. *Kiser,* 105 Va. 695, 54 S. E. 889; *N. & W. Ry. Co.* v. *Crowe,* 110 Va. 798. 805, 67 S. E. 518; *Artz* v. *R. R. Co.,* 34 Ia. 154, 159; *So. Ry. Co.* v. *Wiley,* 112 Va. 183, 191, 70 S. E. 510; *C. & O.* v. *Anderson,* 93 Va. 650, 664, 25 S. E. 947; *Lake Erie, etc., Co.* v. *Stick,* 143 Ind. 449, 41 N. E. 365; *Hunter* v. *N. Y.,*

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etc., Co. 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; *San Antonio Ry. Co.* v. *Choate* (Tex. Civ. App.), 35 S. W. 180; 4 Elliott on R. R. 2723; Moore on Facts, section 160. And it is contended that the physical fact being uncontradicted that a five-hundred candle power arc light was located at the intersection of Fifth and Garrett streets, which was variously estimated by the witnesses as from one hundred feet to two hundred and ten feet behind the plaintiff as he went upon the bridge, this court will judicially know that the testimony of the plaintiff was incredible wherein he said that it was so dark when he found he was on the bridge that he did not know that he was at the northern edge of the bridge; because the physical fact was that such a light at such a distance would so light the bridge that such a statement is in conflict with the physical facts. Such position ignores the effect of the clouds and the dampness of the night of the accident upon the spread of the beams of light from the arc-light toward and upon the bridge; the effect of the fact that such light was behind the plaintiff as he walked to and upon the bridge; the effect of the distance of the light away, which was left to be fixed by the jury from conflicting estimates of it; and the effect of the fact that the plaintiff as he came upon the bridge was faced with a light from within Allen's store which shone in his eyes and thus affected his vision—all of which were facts or circumstances for the consideration of the jury, and which they, having viewed the scene of the accident at the same hour of night and under conditions of cloudiness as nearly alike those which existed on the night of the accident as were found practicable, were in a better position than this court can be to weigh and consider. By their verdict the jury, in effect, found that the alleged conflict with physical facts aforesaid did not in fact exist. And the evidence, set forth in the statement of facts above is such that the jury were warranted in reaching such conclusion.

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This is not a case where an admitted fact, or the testimony for a party to the cause, discloses a physical fact which is irreconcilable with some positions taken in another part or parts of such testimony.

We, as a court, therefore, cannot say that this is a case to which the rule invoked as aforesaid is applicable. On the contrary we are precluded by the verdict of the jury from so holding.

The question under consideration must, therefore, be answered in the negative.

The assignments of error based upon the action of the trial court with respect to the instructions raise the following points for our consideration.

4. It is urged by the city that plaintiff's instruction No. 1 required of it a higher degree of care than the law imposed, in that it used the word "all" as descriptive of the "reasonable care and precaution" which the instruction mentions. This is alleged to be a vice in verbiage very similar to the vice in instructions on contributory negligence consisting in the statement that if the plaintiff's negligence contributed to his injury "in the slightest degree," he was barred, which was condemned in the case of *Clinchfield Coal Corp.* v. *Osborne,* 114 Va. 13, 17, 55 S. E. 750.

We do not think that this point is well taken. The word "all" is not used in the first part of this instruction, which defines the duty of the defendant city. It is used only in connection with that portion of the instruction, which refers to the breach of duty of the city; and while it does emphasize the statement made in that connection, it adds nothing to the degree of care which the law imposed upon the defendant. The word "all" is itself qualified by the word "reasonable" which prevented the misleading of the jury into the idea that any trivial neglect of duty was what was meant by the instruction, for that would not

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have been a failure to use "reasonable care and precaution," but a failure to use an *unreasonable* care and precaution.

5. The point is also urged against plaintiff's instruction No. 1, that in its use of the language "such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence," it allowed the jury to ignore the prior knowledge of the plaintiff of the situation and permitted the plaintiff to recover as if he were in the position of an ideal man exercising reasonable care and prudence, who is referred to in this instruction, although such ideal man may have had no prior knowledge of the situation.

We do not think that there is any merit in this position.

The words, "under the circumstances," employed in the instruction, confined the jury to the consideration of the instant case in which there was no dispute that the plaintiff had prior knowledge of the locality. Whether he had prior knowledge of the defect in the bridge—the absence of the hand-rail—which rendered the crossing of the bridge in the night time dangerous, was a question for the jury and was or was not one of the "circumstances" in the case as they might find to be the fact.

Moreover, when this instruction is read in connection with the other instructions given in the case, there is no room left for the construction of it which is placed upon it by the point under consideration.

6. It is urged that plaintiff's instruction No. 2 is erroneous because it imposes upon the city an absolute duty to provide all things necessary for the safety of travelers.

We do not consider this instruction free from all exception, and therefore do not give it our approval as a model instruction; but we do not think that it is open to the objection urged against it just stated—the only point urged against it in the assignments of error in the petition, and

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hence, the only objection to it which is before us for consideration. With respect to such objection we have the following to say:

It is true that it is well settled that the duty of a municipality to provide safe streets is not absolute. Its duty in that behalf is to exercise "reasonable care" to make and keep its streets "reasonably safe for those exercising reasonable care for their own protection." *Cook* v. *Danville* 116 Va. 383, 385, 82 S. E. 90, L. R. A. 1915a, 1199; *Richmond* v. *Pemberton*, 108 Va. 220, 61 S. E. 787; *City of Richmond* v. *McCormack*, 120 Va., 552, 91 S. E. 767. But the instruction under consideration does not base the plaintiff's right of recovery upon the absolute duty of the city to make the bridge "safe." It does not, indeed, instruct the jury on the subject of the duty of the city in the premises. That function is performed by plaintiff's instruction No. 1, with which the instruction now under consideration must be read. When so read, we think there could have been no misconception of it by the jury on the point urged against it in the assignments of error.

7. It is urged that plaintiff's instruction No. 5 is erroneous because the scope of the jury's enquiry in ascertaining prospective damages is in no way defined.

We think that when read in connection with plaintiff's instruction No. 4 the instruction under consideration is not open to the objection urged against it, instruction No. 4 directed that if the jury should find for the plaintiff, "in estimating his damages they may take into consideration any bodily injuries which he may have sustained by reason of the accident complained of and any physical pain he may have suffered thereby." There was no evidence in the case, it is true, of loss of earning capacity of the plaintiff, but there was evidence of the permanence of his injury and his continued and prospective physical suffering therefrom. Reading the two instructions together we think

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that the reasonable and obvious construction of instruction No. 5 is that it confined the scope of the jury's enquiry in ascertaining prospective damages to the assessment of damages for the permanent bodily injuries aforesaid (for his lack of "good active use of that foot," which the physician testifies was a permanent condition), and for any physical pain they might believe he would suffer in future by reason thereof. See *Winchester* v. *Carroll, supra*, 99 Va. 727, 40 S. E. 37, for an instruction (No. 12 in that case) similar to that under consideration.

8. The refusing to give defendant's instruction No. 3, and the giving of it as modified, is urged as error.

It is contended that this instruction as offered had the purpose to tell the jury that contributory negligence barred recovery. That the instruction as given eliminated that thought altogether and left the defendant with no *general* instruction on that point; "so that the jury were left with no guide whatever on such point, which was vital to the defendant."

This position overlooks the giving of defendant's instruction No. 5 as modified and No. 6. They were not *general* instructions, it is true, but specific instructions having reference to all the evidence in the case on which the defendant relied, or could rely, to show contributory negligence of the plaintiff. They, therefore, furnished the jury with a guide, and the proper guide, on the point of contributory negligence. Instruction No. 6 specifically told the jury that if they found certain facts that the plaintiff was "guilty of contributory negligence and cannot recover." Instruction No. 5, given as modified, was the same in substance. Hence, the giving of a general and abstract instruction on the subject of contributory negligence was unnecessary.

We, therefore, find no merit in the point under consideration.

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9. What has been just said in reference to defendant's instruction No. 3, also applies to and disposes of the assignment of error because of the refusal of the court below to give defendant's general instruction No. 4, on the subject of contributory negligence.

10. The objections urged to the action of the trial court in refusing defendant's instruction No. 5 and giving it as modified, is to the insertion of the language "if he knew or ought to have known of this" (referring to the absence of the hand-rail), in the instruction as offered.

The language objected to manifestly had reference to a prior actual or imputed knowledge of the plaintiff of the absence of the hand-rail; an element of fact, which, if it existed, differentiated the case from that of a pedestrian who had no prior knowledge of the defect rendering the crossing of the bridge dangerous. *Winchester* v. *Carroll*, 99 Va. 727, 743, 40 S. E. 37; *Bedford City* v. *Sitwell*, 110 Va. 296, 65 S. E. 471. And this was, in truth, a question of fact raised by the evidence in the instant case. Such language was, therefore, properly inserted in the instruction.

11. What is said next above as to the giving of defendant's instruction No. 5, also applies to and disposes of the objection urged to the addition of the language, "if he knew or by the exercise of ordinary care ought to have known that it was dangerous," to defendant's instruction No. 7 as offered.

12. The refusal of defendant's instruction No. 8 is not specifically assigned as error in the petition. It is argued, however, in the petition that such refusal was error because the jury were left uninstructed upon the view that the reasonableness of the conduct of the plaintiff should have been determined in the light of the consideration of his old age and the rule of law that if by old age his activity had been impaired that fact imposed upon him the duty of

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using greater precaution—citing *Winchester* v. *Carroll, supra,* 99 Va. 727, 734, 40 S. E. 37.

There was no evidence in the case tending to show that any want of activity on the part of the plaintiff contributed in the slightest degree to the accident.

Even if there had been such evidence it might have been error to have given such instruction, because it was upon the subject of the weight of evidence and singled out and emphasized one circumstance which should have been considered by the jury along with all the other circumstances in the case. That it embodied a correct abstract statement of the law did not make it a proper instruction to the jury.

And as to the old age of the plaintiff, the other instructions given by the court, notably No. 5 as modified, No. 6, No. 7 as modified, No. 9, No. 10 and No. 11, left no room for the jury to entertain the view that old age, or anything else, relieved the plaintiff of the duty to exercise ordinary care in passing along the street and over the bridge.

We do not consider, therefore, that there was any error in refusing the instruction under consideration.

13. The sole remaining assignment of error is the action of the court below in modifying defendant's instruction No. 11 as offered by adding thereto the language, "provided an ordinarily prudent person under similar circumstances would have remembered it."

The objections urged to this added provision is that it introduces a new element into negligence cases. That the *memory* of an ordinarily prudent man is a new attribute of that ideal person; and that what such a man might or might not ordinarily remember cannot be considered by a jury in admeasuring the conduct of a plaintiff by comparing it with that of an ordinarily prudent person under similar circumstances.

It is true, that it is well settled, that the general rule is, that inattention to or forgetfulness of a well known danger

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or peril will not excuse a failure to avoid it. *City of Richmond* v. *Courtney*, 73 Va. (32 Gratt.) 792; 20 R. C. L., p. 110, sec. 96. But where no question of the assumption of risk is involved, but only a question of contributory negligence (as in the instant case), on principle, inattention or failure of memory would not be contributory negligence, if under all the circumstances of the case it was legally excusable. And it is so excusable under certain circumstances, as is expressly held by the authorities—as where the plaintiff has his attention diverted by such a cause, or causes, as would ordinarily induce such forgetfulness or inattention in an ordinarily prudent or careful person in the same or in a similar situation. And there are other circumstances which may take a case of lapse of memory or lack of attention from under the operation of the general rule mentioned. 20 R. C. L., p. 110, sec. 96; 1 Labatt on Master & Servant, sec. 63, 281. After all, then, the enquiry concerning whether a failure of memory, or inattention, is such contributory negligence on the part of a plaintiff as will bar his recovery, is not different, in legal principle, or in practical application, from the enquiry as to whether any other act of the plaintiff constitutes such negligence, and it is to be measured by the same standard applicable to all other acts thus drawn in question, namely. by the standard of the action of the ideal man, which has been fixed upon by the law, to-wit, the action of the ordinarily prudent or careful person under the same or similar circumstances. The instruction under consideration asked the court, in effect, to instruct the jury that there could be no legal excuse for a failure of memory, or for inattention, to a once known fact. This would have been error. Moreover, in the instant case the plaintiff testified, in effect, that by reason of the dirt covered condition of the bridge and the darkness he was not aware that he was on the bridge until he had partly traversed it, and that in this situation,

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the light shining in front of him from Allen's store windows thereupon misled him into the belief that he had reached the eastern end of the bridge and that the path where it left the bridge going up to Allen's store was in front of him and in the direction in which he then proceeded; and that because of that situation he really couldn't say that he was thinking about the hand-rail, and stepped, as he thought, on the path, when he in fact stepped off the side of the bridge. This was a situation in which it was a question of fact for the jury to determine whether the plaintiff was negligent in his inattention to or forgetfulness of the absence of the hand-rail, if they believed from the evidence that he had prior knowledge of its absence. We think, therefore, that there was no error in the modification of defendant's instruction No. 11, which is objected to.

For the foregoing reasons we find no error in the judgment complained of and the same will be affirmed.

Affirmed.

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Richmond.

CONRAD v. CONRAD'S EXECUTOR AND OTHERS.

November 14, 1918.

Absent, Whittle, P.

1. WILLS—*Construction—Stare Decisis—Prior Decisions Construing Wills.*—As it is extremely rare to find two cases alike in all respects, little or no aid can be derived by a court in construing a will from prior decisions construing other wills. It is not enough that the same words in substance, or even literally, have been construed in other cases. It often happens that the same identical words require different constructions, according to the context and the peculiar circumstances of each case.
2. WILLS—*Construction—Intention of the Testator.*—The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills; and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the *expressed* intention of the testator which is sought.
3. WILLS—*Construed as a Whole—Isolated Clauses.*—Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared so as to ascertain the general plan and purpose of the testator, if there be one. Nothing is to be added to or taken from the language used, and every clause and every word must be given effect, if possible.
4. WILLS—*Construction—Technical and Ordinary Words.*—Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. If words or phrases are used which have a well defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent, especially when used by one having knowledge of such significance.
5. WILLS—*Construction—Where Intention is Plain.*—It is not permitted to interpret what has no need of interpretation.

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6. WILLS—*Gift for Benefit of Wife and Children.*—A gift to a wife for the benefit of herself and children, or words of like effect, is a gift to the wife, and the children take no interest or estate in the property given, and are only mentioned to express the motive for the gift to the wife.

7. WILLS—*Gift for Benefit of Wife and Children—Case at Bar.*—In the instant case testator provided, "That the interest on all said investments be collected by my executrix and applied to the support of herself and our children." The executrix was testator's wife.

Held: That the wife of testator took the absolute property in the income of his estate, and that the children had no interest therein.

8. WILLS—*Construction—"Direct."*—Testator in his will "directed" that his debts and liabilities be paid from the proceeds of the unsecured debts, that his secured claims and stocks, so far as regarded as safe by his executrix, should be kept as investments, that his life insurance be collected and the proceeds invested, that his real estate should be sold, and that the interest on all investments collected by his executrix should be applied to her support and the support of her children.

Held: That the word "direct" was not used in the sense of an imperative command or direction, but must be construed as meaning "advise."

9 WILLS—*Construction—Power to Make Advancements.*—A will contained the following provision: "As our children become of age or marry, my executrix may make such advancements of the principal of my estate to them as she may think proper—provided that she secure to herself a net income during her life of fifteen hundred dollars a year."

Held: That the power to make advancements conferred was limited only by the discretion of the executrix, the wife of the testator and the mother of the children.

10. WILLS—*Construction—Gift to Wife—Gift Over to Children.*—A testator provided that, "At my wife's death all of my estate should be so apportioned among my children as to give to each an equal share of the whole." It was contended that this clause gave a vested remainder to the children in the estate. There would be much force in this contention, if the previous provision of the will had simply given the wife a life estate in the whole, with power to make advancements, but this was not the case. The language is by no means mandatory. It was simply the expression of opinion of the testator upon matters as they then stood. The use of the word "should" indicates that it was a mere suggestion, and that the subject was nevertheless left to the discretion of the wife.

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11. WILLS—*Construction—Jus Disponendi.*—Where a person is given absolute dominion over property, whether the estate be legal or equitable, this constitutes a gift of the property itself, and that any gift over of "what remains at her death" or "such part as she may not appropriate," or the like, is void.

12. WILLS—*Construction—Jus Disponendi—Case at Bar.*—In the instant case testator directed "that the interest on all said investments should be collected by my executrix and applied to the support of herself and our children, but should such income, in the opinion of my executrix, prove inadequate for that purpose, then she might use the principal to any extent she may desire."

Held: That executrix, who was testator's wife, had an unlimited power of disposal during her lifetime of the estate devised and bequeathed by the testator's will.

13. WILLS—*Partial Intestacy.*—A will contained the following clause: "That my real estate, except my dwelling, which is owned jointly with my wife, be sold at public or private sale by my executrix, and the proceeds be invested as directed in the preceding clause."

Held: That the testator died intestate as to his one-half interest in the property described as my dwelling house.

Appeal from a decree of the Corporation Court of city of Winchester. Decree for complainant. Defendant appeals.

Affirmed.

The opinion states the case.

Jas. P. Reardon, for the appellant.

Thos. W. Harrison and *R. Gray Williams*, for the appellees.

BURKS, J., delivered the opinion of the court.

Holmes Conrad, a distinguished lawyer of the city of Winchester, Va., executed his holograph will in October, 1883, and died in September 1915. At the time the will was executed his family consisted of his wife and seven

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children, all under age, and several of them of very tender years. At the time of his death all of the children were of age, several of them had married and established homes of their own, one or more of them were still living with him, and one married daughter had died leaving an infant of tender years who was named after the testator. It does not appear that any children were born after the date of the will. After the will was admitted to probate, the bill in this cause was filed by his widow in her own right and as executrix asking for its construction. The appellant answered the bill, denying some of its most important allegations, and making certain charges and allegations, which need not be here stated, by way of a cross-bill against the complainant. The complainant demurred to the cross-bill, which demurrer the trial court, in the main, sustained.

Very few of the facts and circumstances surrounding the testator are given in either the bill or the cross-bill, and what are herein stated are mainly gathered from admissions or uncontroverted statements in the briefs of counsel. They give little, if any, aid in the interpretation of the will. The only question involved is what estates did the widow and children of the testator, respectively, take under his will. The following is a copy of the will:

"I, Holmes Conrad do make this my last will, written throughout with my own hand.

"1. I direct that my debts and liabilities be paid as far as may be from the proceeds of the unsecured debts due to me.

"2. That my secured claims and my stocks as far, and so long as they may be regarded by my executrix as safe, be kept as investments so long as the interest is promptly paid.

"3. That my life insurance be collected and the proceeds be invested in some good six per cent. fund or real estate security in Virginia.

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"4. That my real estate, except my dwelling, which is owned jointly with my wife, be sold at public or private sale by my executrix, and the proceeds be invested as directed in the preceding clause.

"5. That the interest on all said investments be collected by my executrix and applied to the support of herself and our children.

"6. But should such income, in the opinion of my executrix, prove inadequate for that purpose, then she may use the principal to any extent that she may desire.

"7. As our children become of age or marry, my executrix may make such advancements of the principal of my estate to them as she may think proper—provided that she secure to herself a net income during her life of fifteen hundred dollars a year.

"8. All of my personal property, except my cash and choses in action, I give to my wife.

"9. At my wife's death all of my estate should be so apportioned among my children as to give to each an equal share of the whole.

"10. I appoint my wife, Georgia B. Conrad, sole executrix of my will, and desire that she qualify without surety.

"Witness my hand this 1 October, 1883.

"HOLMES CONRAD."

Before proceeding with the interpretation of the will, we will advert to certain underlying principles which are controlling in the interpretation of all wills, and to some of the decisions of this court construing somewhat similar language in other wills, bearing in mind, however, the admonition that "as it is extremely rare to find two cases alike in all respects, little or no aid can be derived by a court in construing a will from prior decisions construing other wills. It is not enough that the same words in substance, or even literally, have been construed in other

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cases. It often happens that the same identical words require different constructions, according to the context and the peculiar circumstances of each case." *Rhett* v. *Mason,* 59 Va. (18 Gratt.) at p. 560.

The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when sacertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the *expressed* intention of the testator which is sought.

Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared so as to ascertain the general plan and purpose of the testator, if there be one. Nothing is to be added to or taken from the language used, and every clause and every word must be given effect, if possible. Generally, ordinary words are to be given their usual and ordinary meanings, and technical words are presumed to have been used in a technical sense. If words or phrases are used which have a well defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent, especially when used by one having knowledge of such significance. If, when so considered, the intention of the testator can be discerned that is the end of the investigation, as "it is not permitted to interpret what has no need of interpretation." Compare, *Ross* v. *Ross,* 115 Va. 374, 79 S. E. 343.

In the case in judgment, the gift in clause five of the will to the testator's wife, to be "applied to the support of herself and our children" is of the class of phrases above mentioned, and the testator must have been familiar with

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the construction placed upon it by a line of decisions of this court, for he was an able and well informed attorney, living and practicing his profession in this State. In an unbroken line of decisions from *Wallace* v. *Dold*, 30 Va. (3 Leigh) 258, decided in 1831, to *Honaker* v. *Duff*, 101 Va. 675, 44 S. E. 900, decided in 1903, it has been held that a gift to a wife for the benefit of herself and children, or words of like effect, is a gift to the wife, and that the children take no interest or estate in the property given, and are only mentioned to express the motive for the gift to the wife. It would be a work of supererrogation to review the cases as that has been sufficiently done in *Stace* v. *Bumgardner*, 89 Va. 421, 16 S. E. 252, and *Tyack* v. *Berkeley*, 100 Va. 296, 40 S. E. 904, 93 Am. St. Rep. 963. We have no difficulty, therefore, in declaring that as to the income of testator's estate mentioned in clause five of his will, his wife took the absolute property, and that his children have no interest therein.

We are to ascertain the meaning of the words used in the will, not in the abstract, but in the sense in which they were used by the testator, if that can be ascertained. Counsel for the appellant, in his brief and also in his oral argument, insists that the word "direct" used in paragraph one of the will, and which is applicable to the first five paragraphs thereof, is used in the sense of an imperative command or direction, that the testator sought by its use to keep control of his estate after his death, and conserve it for the benefit of his children after the death of their mother. The word, however, also means "to point out a way; to indicate a course to; advise concerning a course or procedure" (standard dictionary), and we are of opinion that it was in this sense the testator used it in his will. It must be borne in mind that the testator was writing his will that could not take effect until his death, when his wife could no longer have the benefit of his ad-

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vice and assistance, and hence, as far as he could anticipate, he undertook to "advise" her, to "point out" and "indicate" to her, the course of conduct or procedure to be followed in the administration of his estate. That the testator had implicit confidence in the ability and integrity of his wife, is manifested by the fact that he appointed her the sole executrix of his will, and "without surety." But our women are not educated in business affairs, and when to the cares of the family there is added the cares of business, they are greatly in need of professional advice upon which they can rely with confidence. With full knowledge of these facts, the testator directs or advises his wife to collect his unsecured debts and from the proceeds discharge his liabilities, to keep intact his stocks and investments made by him "so long as the interest is promptly paid," to invest his life insurance money in good six per cent. funds or real estate security, and to sell his real estate and make like investment. After telling her how the investments were to be made, he then directs how the interest thereon is to be applied. We are unable to concur in the view that these directions were other than advisory only.

The power to make advancements conferred by paragraph 7 of the will is limited only by the discretion of the mother. We attach no importance to the use of the word "executrix" instead of "wife" in this and other clauses of the will. The wife was nominated in the will as the "sole executrix of my will," and there is nothing in the will to indicate that the testator had in mind any other person than his wife. The proviso in this paragraph was solely for the benefit of the wife, was advisory only, and no one could complain if she chose to waive it. The wife was to make such advancements "as she may think proper." The children were then small, and as their needs might vary greatly as they grew up and settled in life, this entire subject was left wholly to the discretion of the wife. As justly

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observed by Judge Keith in *Tyack* v. *Berkeley,* 100 Va. 301, 40 S. E. 907, 93 Am. St. Rep. 963.

"The wit of man has not yet discovered a safer repository than the mother for the rights and interest of children. Under the stress of some great emergency she may sacrifice the apparent and immediate interest of the child, but even in such a case a full knowledge of the surrounding facts and circumstances might go far to vindicate the propriety and wisdom of her conduct. As a rule, her love and spirit of self-abnegation, where her children are concerned, may be trusted to do what is wisest and best to conserve and promote their interests."

The wisdom of this discretion vested in the wife seems to be vindicated by what the testator himself did in reference to this matter. He lived upward of thirty years after his will was written, and, while he made advancements to all of his other children, he made none to the appellant, and one of the grounds of complaint in appellant's answer is "the testator in his lifetime and his executrix since his death, have made repeated and large advancements to all of said children save your respondent."

It is insisted by counsel for the appellant that the 8th clause of the will by which the testator gave to his wife his tangible personal property, consisting chiefly of household and kitchen furniture, was the only direct gift to the wife alone, and that the 9th clause gave a vested remainder to his children in all the residue of testator's estate. The latter clause is as follows: "At my wife's death all of my estate should be so apportioned among my children as to give to each an equal share of the whole." There would be much force in this contention, if the previous provision of the will had simply given the wife a life estate in the whole, with power to make advancements, but that is not our interpretation of the will as a whole. The language is by no means mandatory. It was simply

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the expression of opinion of the testator upon matters as they then stood. His children were small, and he could not then see any reason for discrimination between them, but knowing that the situation might change, he gave no direction on the subject and left the whole subject to the discretion of his wife. The use of the word "should" indicates that it was a mere suggestion, and that the subject was nevertheless left to the discretion of the wife.

By clauses 5 and 6 of the will, the testator directs, (5) "that the interest on all said investments be collected by my executrix and applied to the support of herself and our children, (6) but should such income, in the opinion of my executrix, prove inadequate for that purpose, then she may use the principal to any extent she may desire." We have already seen that by clause 5 the wife took the absolute property in "the interest on all said investments." As to the "principal," the wife is given the power to use it "to any extent she may desire," in the event that, *in her opinion*, the income from the investments were not adequate for the purpose mentioned. It matters not what was the value of the testator's estate, or of the interest on the investments, the sole test of the inadequacy of the interest was *her opinion* on the subject, which no court could control or direct. It was a large power to confer upon the wife, but it was fully within the power of the testator to confer it, without let or hindrance from any source, and he has conferred it in the most explicit terms. He plainly had the most implicit confidence that the power would be honestly exercised, and, even if he was in error in that respect there is no one who can limit her power, or hold her to account for its improper exercise. In a long line of decisions in this State from *Shermer* v. *Shermer*, 1 Wash. (1 Va.) 266. 1 Am. Dec. 460 to *Smith* v. *Smith*, 122 Va. 341, 94 S. E. 777, it has been held that where a person is given absolute dominion over property, whether the estate

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be legal or equitable, this constitutes a gift of the property itself, and that any gift over of "what remains at her death" or "such part as she may not appropriate," or the like, is void. The language of the gift over varies, but the same conclusion is reached. If the power is conferred it is immaterial whether it is exercised or not. The estate granted remains the same. *Crutchfield* v. *Greer,* 113 Va. 232, 74 S. E. 166. It might be supposed that the above holding, which is generally designated as the doctrine of *May* v. *Joynes,* 61 Va. (20 Gratt.) 692, was restricted to cases where the dominion of the first taker was unlimited and unqualified, and that it would not apply where the power of the first taker, though unlimited, was yet qualified, and to be exercised only in a given event, or for a given purpose, as for example as unlimited power of disposal for "support and maintenance," but the cases do not justify such a restriction of its application, and the rule is so firmly settled that it has become a rule of property, and we do not feel at liberty to depart from it. In *Brown* v. *Strother,* 102 Va. 145, 47 S. E. 236, the gift was to a brother and sister of "all I possess on earth *for their support, to be used in no other way*" (italics supplied), and "if there is anything left after their death," there was a gift over to others, but the latter was held void. In *Rolley* v. *Rolley,* 109 Va. 449, 63 S. E. 988, 21 L. R. A. (N. S.) 64, the gift was to the wife "to be used and enjoyed by her, in such quantities as may be requisite for *her comfortable maintenance* (italics supplied, so long as she remain my widow," and in *Randall* v. *Harrison,* 109 Va. 686, 64 S. E. 992, the gift was to the wife, and the testator, after stating that he was apprehensive that after paying his debts there would not be enough left from the proceeds to give her *a decent maintenance* (italics supplied) "from the interest in such residue" authorized his wife to use "any and all the principal," declaring, however, "but it is my wish and injunction, which I know will be faithfully carried

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out by my dear wife, that the principal of any amount left from my estate be drawn upon to supply her own necessities." In each of these cases it was held that the wife took a fee in the real estate and an absolute estate in the personalty; and that the gift over "of all the property * * * which shall then be unconsumed" in the first case, and "of anything that may be left," in the other case, was void. Applying these principles to the case in judgment, the conclusion is inevitable that under the sixth clause of the will Mrs. Conrad has an unlimited power of disposal during her life-time of the estate devised and bequeathed by the testator's will.

A list of the cases decided by this court on this subject is given in the margin for convenience of reference.* In none of these cases, however, is the effect of the act of 1903 (Acts 1908, p. 187) amending section 2418 of the Code considered, nor is it necessary now to consider it, as Mrs. Conrad is still living and the will provides that, under the circumstances therein mentioned, "she may use the principal to any extent that she may desire."

Looking to the will as a whole, we are of opinion that the testator intended to advise his wife with reference to the

*The following cases deal with the subject. Shermer v. Shermer, 1 Wash. (1 Va.) 266, 1 Am. Dec. 460; Riddick v. Cohoon, 4 Rand. (25 Va.) 547; Madden v. Madden, 2 Leigh (29 Va.) 377; Burwell v. Anderson, 3 Leigh (30 Va.) 348; Nelson v. Cooper, 4 Leigh (31 Va.) 408; Dunbar v. Woodcock, 10 Leigh (37 Va.) 628; Brown v. George, 6 Grat. (47 Va.) 424; Sprinkle v. Hayworth, 26 Grat. (67 Va.) 384; Missionary Soc. v. Calvert, 32 Grat. (73 Va.) 357; Carr v. Effinger, 78 Va. 197; Cole v. Cole, 79 Va. 251; Randolph v. Wright, 81 Va. 608; Johns v. Johns, 86 Va. 333, 10 S. E. 2; Miller v. Potterfield, 86 Va. 876, 11 S. E. 486, 10 Am. St. Rep. 919; Hall v. Palmer, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653; Bowen v. Bowen, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664; Smythe v. Smythe, 90 Va. 638, 19 S. E. 175; Farish v. Wayman, 91 Va. 430, 21 S. E. 810; Davis v. Heppert, 96 Va. 775, 32 S. E. 467; Honaker v. Duff, 101 Va. 675, 44 S. E. 900; Brown v. Strother, 102 Va. 145, 47 S. E. 236; Robertson v. Hardy, 23 S. E. 766, 2 Va. Dec. 275; Bing v. Burrus, 106 Va. 478, 56 S. E. 222; Hawley v. Watkins, 109 Va. 122, 63 S. E. 560; Rolley v. Rolley, 109 Va. 449, 63 S. E. 988, 21 L. R. A. (N. S.) 64; Hunter v. Hicks, 109 Va. 615, 64 S. E. 988 Randall v. Harrison, 109 Va. 686, 64 S. E. 992; Hansbrough v. Presbyterian Church, 110 Va. 15, 65 S. E. 467; Crutchfield v. Greer, 113 Va. 232, 74 S. E. 166; Taylor v. Johnson, 114 Va. 329, 76 S. E. 325; Avant v. Cook, 118 Va. 1, 86 S. E. 903; Smith v. Smith, 122 Va. 341, 94 S. E. 777. Johns v. Johns, 86 Va. 333, 10 S. E. 2, is distinguished on the facts from May v. Joyes, supra, and Miller v. Potterfield, 86 Va. 876, 11 S. E. 486, 19 Am. St. Rep. 919, is overruled by Hansbrough v. Presbyterian Church, supra.

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management of his estate, including the matter of advancements, to give to her absolutely the tangible personal property mentioned in clause 8 of his will, and the interest on all the investments mentioned in clause 5, and that as to the whole of the principal of his estate mentioned in clause 6 he gave to her the unlimited and unrestricted use.

It is assigned as cross-error by the appellees that the trial court erred in holding that the testator died intestate as to a one-half interest in the property described as "my dwelling," instead of holding that she had a life estate therein by implication.

We find no error in the holding of the trial court in this or any other respect, and its decree will be in all respects affirmed.

Affirmed.

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Richmond.

HILLIARD v. UNION TRUST COMPANY OF NEW JERSEY AND OTHERS.

November 14, 1918.

Absent, Sims, J.

1. APPEAL AND ERROR—*Objections not Raised Below—Non-Jurisdictional Questions.*—Speaking generally, it is the established rule that objections not raised in the lower court (or if in fact made, unless properly presented in the record) will not be considered in the appellate court. Of course, the rule is otherwise where the questions are jurisdictional.
2. APPEAL AND ERROR—*Objections not Raised Below—Non-Jurisdictional Questions.*—If, however, the objection be that the trial court had no jurisdiction of the *subject matter* of the litigation, the objection may be made in the appellate court for the first time. Indeed, if the trial court had no jurisdiction of the *subject matter*, its judgment is a mere nullity and may be treated as such. It may be assailed, directly or indirectly, anywhere, at any time, in any way.
3. APPEAL AND ERROR—*Effect Given Judgment of Trial Court Where Jury is Waived.*—Where a jury was waived and all questions of law and fact submitted to the trial court, and the evidence, and not the facts, is certified, the rule of decision in the appellate court is to give the judgment of the trial court the same effect as the verdict of a jury.
4. APPEAL AND ERROR—*Conflicting Evidence.*—Where the trial court, upon conflicting evidence, determined a question of fact, its finding will not be disturbed upon writ of error.
5. JUDICIAL SALES—*Inadequacy of Price.*—Where the evidence showed that the subject of a judicial sale brought a good price, the testimony of a witness at a subsequent time that he would give a larger price for the property was insufficient to overbalance it. The offer having been made under changed conditions, after the subject of the sale had advanced in price, and the witness having been a bidder at the former sale.
6. JUDICIAL SALES—*Estoppel—Modification of Terms of Sale.*—The owner of property which was sold at a judicial sale, having

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procured a modification of the terms of sale, which, in good faith, was complied with by the purchaser, was estopped from objecting to its confirmation.

7. APPEAL AND ERROR—*Interest of Plaintiff in Error—Power of Attorney.*—An instrument executed by a mother to her son, William C. T. Hilliard, concluded as follows: "And I do hereby constitute and appoint William C. T. Hilliard my true and lawful attorney in my name, but at his own costs and charges, to take all legal measures which may be necessary to enforce the stipulations and agreement herein contained and to receive the moneys due or to grow due thereon now in the hands of the sheriff of Rockingham county, Virginia."

Held: That, it was the intention of the mother, by the writing in question, to constitute her son her attorney in fact to represent her in the litigation, and not to invest him with her interest in the proceeds of the sale of her land under the order of court; therefore, a motion to dismiss a writ of error on the ground that it was improvidently awarded, because the mother, the plaintiff in error, had previously conveyed all her interest in the subject matter of the litigation to her son, was overruled.

Error to a judgment of the Circuit Court of Rockingham county, in an action of debt and in attachment proceedings ancillary thereto. Judgment for plaintiff. Defendants assign error.

Affirmed.

The opinion states the case.

D. O. Deckert and *J. M. Perry,* for the plaintiff in error.

Chas. A. Hammer and *Thos. W. Shelton,* for the defendants in error.

WHITTLE, P., delivered the opinion of the court.

The attachment in this case was ancillary to an action of debt instituted in the Circuit Court of Rockingham county by one of the defendants in error, the Union Trust Company of New Jersey, a corporation, against plaintiff

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in error, Ann P. Hilliard, and William C. T. Hilliard, for the recovery of $1,018.39, with interest and costs, due upon a foreign judgment. Neither the validity of the debt nor the attachment is controverted. And many of the assignments of error contained in the petition for a writ of error need not be noticed, since they do not involve jurisdictional questions and were not made the ground of exception in the trial court. Speaking generally, it is the established rule that objections not raised in the lower court (or if in fact made, unless properly presented in the record) will not be considered in the appellate court. Of course, the rule is otherwise where the questions are jurisdictional. Burks' Pl. & Pr., p. 770, *et seq.*

At p. 771, the learned author says: "If, however, the objection be that the trial court had no jurisdiction of the *subject matter* of the litigation, the objection may be made in the appellate court for the first time. Indeed, if the trial court had no jurisdiction of the *subject matter*, its judgment is a mere nullity and may be treated as such. It may be assailed, directly or indirectly, anywhere, at any time, in any way."

In this instance the *subject matter* of the litigation was the one-half undivided interest of plaintiff in error, Ann P. Hilliard, in a tract of 4,614 acres of mountain land located in Rockingham county. The attachment was lawfully issued and levied upon that interest; and those proceedings were followed by the establishment of plaintiff's claim and judgment and an order of sale in substantial compliance with the statute.

The order of sale directed the sheriff to sell so much of the attached interest in the land as was necessary to discharge the debt and costs. The defendants against whom the claim was asserted not having appeared or been served with a copy of the attachment sixty days before judgment, plaintiff was required to execute bond with personal security as required by Code, section 2983.

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It may be observed that a jury was waived and all questions of law and fact submitted to the court; and in such case, where "the evidence, and not the facts, is certified, the rule of decision in the appellate court is to give the judgment of the trial court the same effect as the verdict of a jury." *Martin* v. *Richmond, &c. R. Co.*, 101 Va. 406, 44 S. E. 695; *Gray* v. *Rumrill*, 101 Va. 507, 44 S. E. 697; *Hamman* v. *Miller*, 116 Va. 873, 83 S. E. 382.

The sheriff returned his report of sale of the property to J. R. Foley for $7,000, to the confirmation of which Ann P. Hilliard filed exceptions: (1) Because the advertisement was not in conformity with the order of sale, in this that it announced a sale of her entire undivided one-half interest in the land, whereas the order only directed a sale of so much thereof as was necessary to pay the debt with interest and costs; (2) because the sheriff had no right to conclude, in violation of the terms of the order of sale, that it was not practicable to sell only a part of such interest; (3) because the sale was on credit as to part of the purchase money instead of for cash, as required by the order of sale; and (4) because the property was sold for a grossly inadequate price. These objections to the confirmation of the sale constitute the real matter of controversy in the case.

It appears that on the day of sale, and after the property had been knocked down to the purchaser for $7,000, plaintiff in error, Ann P. Hilliard, by her attorney, procured from the court a modification of the original terms of sale, for cash, and authorizing the officer in lieu thereof to receive from the purchaser cash sufficient to discharge plaintiff's debt and costs, and for the residue of the purchase money to take four bonds with good personal security, in equal instalments, payable to Ann P. Hilliard at six months and one, two and three years respectively, with interest from date. The purchaser in good faith complied with

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these terms, and the court confirmed the sale. It is true that the authority of counsel to represent the owner in having the order of sale modified is denied; but the trial court, upon conflicting evidence, resolved that question against her, and upon the authorities cited its finding will not be disturbed upon writ of error.

The same may be affirmed of the fourth ground of exception to the report of sale, namely, that plaintiff in error's undivided moiety in the land sold for a grossly inadequate price. The weight of the evidence showed that the interest brought a good price; and the testimony of a witness at a subsequent time that he would give $10,000 for the property was insufficient to overbalance it. The offer was made under changed conditions, after the land, timber and bark had advanced in price; and besides the witness was a bidder at the former sale. It is plain that plaintiff in error, having procured a modification of the terms of sale, which, in good faith, was complied with by the purchaser, was estopped from objecting to its confirmation.

Other irregularities and errors, if such there were, assigned as error in the petition for a writ of error, were not made grounds of exception in the trial court, and, for the reasons stated, do not demand further notice. A careful review of the record shows a substantial compliance with the attachment statutes; and "a more technical construction * * * would lead to inconvenience in practice, and often to a miscarriage of justice, without any resultant benefits." *Richardson* v. *Hoskins Lumber Co.*, 111 Va. 755, 757, 69 S. E. 935.

Defendants in error submitted a motion to dismiss the writ of error on the ground that it was improvidently awarded, because it was said plaintiff in error had previously conveyed all her interest in the subject matter of the litigation to her son and co-defendant, William C. T. Hilliard. We think that it was the true intent and pur-

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pose of Mrs. Hilliard, by the writing in question, to constitute her son her attorney-in-fact to represent her in the litigation, and not to invest him with her interest in the proceeds of sale of the land. The instrument concludes: "And I do hereby constitute and appoint William C. T. Hilliard my true and lawful attorney in my name, but at his own costs and charges, to take all legal measures which may be necessary to enforce the stipulations and agreement herein contained and to receive the moneys due or to grow due thereon now in the hands of the sheriff of Rockingham county, Virginia." The motion to dismiss the writ of error is, therefore, overruled.

We find no reversible error in the orders complained of, and they must be affirmed, and the cause remanded for further proceedings to be had therein not in conflict with the views expressed in this opinion.

Affirmed.

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Richmond.

JOHNSON v. MUNDY.

November 14, 1918.

Absent, Whittle, P.

1. APPEAL AND ERROR—*Final Decree—Section 3454, Code of 1904.*—An order overruling exceptions to an answer for insufficiency is not a final decree or order, as that term is used in section 3454, Code of 1904, allowing appeals from such decrees or orders.
2. APPEAL AND ERROR—*Decrees Appealable—"Principles of the Cause"—Code of 1904, Section 3454.*—In a suit to determine whether certain gifts from a parent to a child and her husband were gifts or advancements, an order overruling plaintiff's exceptions to defendants' answer, which decided against the plaintiff a very important question to him, namely, the right to the relief sought by his bill of a discovery by the defendants of all sums of money or property received by them or either of them from the decedent, determined a rule of evidence by which the rights of the parties were to be finally worked out and adjudicated a "principle of the cause," and hence is appealable.
3. WITNESSES—*Transactions with Decedents.*—In a suit to determine whether certain gifts from a parent to a child and her husband were gifts or advancements, the donor being dead the recipients of the gifts are not competent witnesses to explain that the gifts were not intended as advancements.
4. ADVANCEMENTS—*Presumption.*—In cases of alleged advancements the mere *factum* of a substantial gift, unexplained, is in itself evidence that the gift was intended as an advancement. The latter may be inferred from the former.
5. ANSWER—*Discovery—Waiver of Answer under Oath.*—If a plaintiff, in a bill for equitable relief (which the court has jurisdiction to give independent of discovery), prays for certain disclosures of fact by the defendants, in aid of such equitable relief, but waives answer under oath, the plaintiff cannot except to the answer as insufficient because the respondents, although answering fully as to all other portions of the bill, fail to make

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the discovery asked for. In the absence of statute, or some rule of court authorizing it, there can be no discovery compelled by a bill waiving answer under oath, and section 3281 of the Code of 1904 has not changed this established rule of procedure in chancery.

6. DISCOVERY—*Object of.*—The immediate object of discovery in all bills in equity was, in its origin, and still is, *not to obtain relief, but evidence.* The discovery enables one party to search the conscience of his antagonist and to compel him to make disclosures upon oath of facts necessary to the preservation of the rights of the former, which he otherwise might not be able to prove.

7. DISCOVERY—*Jurisdiction of Equity.*—Except in cases of mixed bills of discovery, where the statute law on the subject does not expressly abrogate the jurisdiction of courts of equity to compel discovery (and the statute law in Virginia does not), that jurisdiction still exists.

8. DISCOVERY—*Extent of.*—Except in a case of a mixed bill of discovery, as to which a different rule prevails, it has been long well settled, as the result of the development of equity jurisdiction, that a plaintiff in equity is not confined in his right to discovery to cases where he cannot otherwise prove the facts sought to be supplied in evidence by means of discovery, but he may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense.

9. ANSWER—*Double Office—Pleading and Evidence.*—An answer in cases where relief is sought, properly consits of two parts; and in fact performs a double office. It consists, first, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath, as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually addressed.

10. ANSWER—*Sufficiency.*—The answer, as a pleading, may traverse each and all of the material allegations of the bill directly, distinctly, categorically and unequivocally, but that is not enough, if the plaintiff insists upon a full answer. It must go further and state affirmatively the facts constituting the defense of the respondent, whether that defense is in conflict, in whole or in part, with the allegations of fact in the bill, or is in confession and avoidance.

11. ANSWER—*Time for Filing.*—Although it is true that under section 3275 of the Code of 1904 a defendant may be allowed, under certain restrictions, to file his answer at any time before final decree, that does not affect the right of the plaintiff, by the proper proceeding, to have the court compel him to answer sooner.

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12. ANSWER—*Sufficiency.*—The defense set up in the answer should be a sufficient defense; and the plaintiff is entitled to insist upon an answer, not only according to the "knowledge" of the defendant, but also "as to his remembrance, information and belief."

13. ANSWER—*Answer not under Oath—Exceptions.*—An answer not under oath is not free from all exception for insufficiency. But the requirements of modern equity procedure as to affirmative statements of defense in an answer, when considered merely as a pleading, does not lead to the result of allowing a plaintiff to compel a respondent to go beyond traversing each and all of the material allegations of the bill and giving an affirmative statement of facts constituting his own defense, and compel him to also add a statement of facts not a part of his defense, but a part of the plaintiff's case, and which the plaintiff needs and seeks *as evidence* to support his case.

14. ANSWER—*Waiver of Answer under Oath—Rule that Defendant must Answer Fully.*—In the instant case where complainant waived an answer under oath, the defendants having answered fully all of the allegations of the bill, except the interrogatory, they could properly refrain from answering further, and this notwithstanding the general rule that having answered defendant must answer fully.

Appeal from an order of the Circuit Court of Nelson county. Decree for defendants. Complainant appeals.

Affirmed.

The appellant was plaintiff and the appellees defendants in the court below, and they will be hereinafter referred to accordingly.

The questions presented in the cause are raised by exceptions of the plaintiff to the answer of the defendants for insufficiency.

The bill was filed for the settlement, distribution and division of the estate, real and personal, of C. I. Johnson, deceased, who died intestate, and was the father of the plaintiff and of the defendant, Mrs. Annie C. Mundy, the two being the only children and heirs at law of the decedent. J. A. Mundy is the husband of Mrs. Annie C. Mundy.

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The material allegations of the bill are contained in the sixth paragraph thereof, and are the following:

"6th. Complainant further shows unto your honor that his sister, Mrs. Mundy, received from her father in his lifetime certain estate, both real and personal; that J. A. Mundy, the husband of complainant's said sister, received from said C. I. Johnson in his lifetime other estate of very considerable amount. The said C. I. Johnson also gave considerable property to the daughter of said J. A. Mundy, which upon the death of said daughter, passed to the said J. A. Mundy.

"Complainant's said father, in his lifetime, gave to complainant certain real and personal property, the value of which complainant supposes to be between $40,000 or $45,000. A full and accurate list of such property will be filed in this cause during its progress, if desired. The said C. I. Johnson gave to complainant's son property of the aggregate value of about $40,000.

"Complainant avers that it was the purpose and intention of his said father that the money and property received by complainant and his sister and her husband, as aforesaid, should stand upon the same footing and be treated exactly alike, and he is advised that such is the law.

"Complainant is advised that to the extent either of his father's children or the husband of his daughter may have received any property from his said father in his lifetime; that the amount or value thereof will be brought into hotchpot, before the party receiving the same will be entitled to receive anything more from the said estate.

"Complainant believes not only the statute in such case made and provided requires, but that equity and justice demand, that in the division of his father's said estate, his sister should be charged with the money and property received by her and her husband aforesaid, and complainant charged with the money and property received by him, and

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he is willing and desirous that it shall be done. Certain it is that it will be impossible to settle up and distribute the said estate between his sister and himself, until it is settled and determined just what relation these items have or bear to the said estate."

The bill waives answer under oath, and the prayer thereof, so far as material, is as follows:

"* * complainant prays that * * the said * * Annie C. Mundy and J. A. Mundy may be made parties defendant thereto, with leave to answer the same, but not under oath, such oath being hereby waived; that the said Annie C. Mundy and J. A. Mundy may be required to show any and all sums of money or property received by them or either of them from the said C. I. Johnson in his lifetime; that it may be settled and determined to what extent money or property given by the said Johnson to his children and son-in-law are to be charged in the division of his estate; * *"

The defendants, Mrs. Annie C. Mundy and J. A. Mundy, her husband, filed their joint and separate answer, not under oath, to the plaintiff's bill. The answer responds directly, distinctly, categorically and unequivocally to every paragraph of the bill, except to the sixth paragraph thereof, above quoted. The response of the answer to such paragraph of the bill is as follows:

"(6) Respondents deny that it was the purpose and intention of the said C. I. Johnson that any money or property that he may have given respondents in his lifetime should be treated as advancements and now brought into hotchpot and charged to respondent, Annie C. Mundy, before she will be entitled to receive anything more from the said estate.

"On the contrary, respondents aver that any money or property given them by the said C. I. Johnson in his lifetime were intended by him as gifts and not as advance-

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ments. Any gifts made to the said respondent, J. A. Mundy, by said C. I. Johnson were for a valuable consideration, the said J. A. Mundy having been induced by the said C. I. Johnson to give up his work as a contractor and to come and live near the said C. I. Johnson and assist him.

"Respondent Annie C. Mundy was her father's favorite child, with whom he spent much of his time and she in innumerable ways ministered to his comfort. He testified to his preference for her on many occasions and indeed at one time made a will in which he gave her all of the property that he might own at his death.

"In his lifetime he made such provision as he desired to make for the said complainant, John E. Johnson, by making him large gifts of money and property, including a one-half interest in the very profitable business of the firm of C. I. Johnson & Son.

"The said will was made in duplicate one copy being given respondents to keep and the other being kept by the said C. I. Johnson, and both copies after having been kept for several years were destroyed by the said C. I. Johnson, at the request of the respondents who desired to avoid the family disagreement likely to follow therefrom if such a will should be in force at the time of the death of the said C. I. Johnson."

The exceptions to the answer are as follows:

"The plaintiff, by counsel, excepts to the joint answer filed in the above styled causes by Mrs. Annie C. Mundy and J. A. Mundy, her husband, because:

"1st. The said answer is insufficient, in not disclosing what sums of money and property was received by them, or either of them, from the said C. I. Johnson in his lifetime, as required by the bill.

"2nd. The said answer, instead of giving the information asked for in the bill, whilst practically admitting that they did receive money or property or both, from the said C. I.

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Johnson, in his lifetime, fails to disclose the character and amount thereof, as required by the bill.

"3rd. The said answer seeks to evade the issue, by stating a legal conclusion, upon which the said defendants are not entitled to pass, and as to which they were not called upon to make any response.

"Wherefore, the plaintiff prays that the said defendants may be required to file a further answer, fully setting out all the various items of money or property received by them, or either of them, from the said C. I. Johnson in his lifetime."

The court below, being of opinion that the answer was legally sufficient, entered the order complained of, which overruled the exceptions, and the plaintiff assigns such action as error.

The defendants submit that the appeal should be dismissed "on the ground that the order appealed from is not a final decree;" that "it is a mere refusal of the court to allow exceptions to an answer for insufficiency;" that "it settles no question involved in the proceedings, but merely a question of pleading;" and they submit that "it is * * clearly not an appealable order, and the appeal should therefore be dismissed as improvidently awarded. *Hobson* v. *Hobson*, 100 Va. 216, 40 S. E. 899; *Smith* v. *Pyrities Mining, etc. Co.*, 101 Va. 301, 43 S. E. 564.

Caskie & Caskie, for the appellant.

Harrison & Long and *Aubrey E. Strode*, for the appellees.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

1. We are met on the threshold of the case by the question whether the order complained of is appealable.

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This question is not free from difficulty. Its determination depends, of course, upon the proper construction and application of section 3454 of the Code. That statute, so far as material, provides as follows: "* * any person who is a party to any case in chancery wherein there is a decree or order * * adjudicating the principles of a cause, or any person thinking himself aggrieved * * by a final * * decree or order in any civil case, may present a petition, if the case be in chancery, for an appeal from the decree or order: * *"

We do not consider the order complained of a final decree or order. Did it adjudicate "the principles of the cause?"

In *Hobson* v. *Hobson,* 100 Va. 216, 40 S. E. 899, cited by the defendants, the appeal was sought from an order sustaining a demurrer to an amended bill filed at rules and dismissing same upon the ground that it made an entirely new case inconsistent with and repugnant to the case stated in the original bill. This court dismissed the appeal. The court said: "The order appealed from is not a final decree. The original proceedings are still pending, may be revived against the representatives of the deceased parties and proceeded with as if the amended bill had never been filed." It is true this court in that case held that the order did not adjudicate the principles of the cause. But, as stated in the opinion therein, that was "a mere refusal of the court to allow the pleadings to be amended in the manner attempted by the amended bill, and settles none of the questions involved in the original proceedings." The latter cannot be said of the order complained of in the instant cause.

The order we have now under consideration decided against the plaintiff a very important question to him, involved in the original proceeding, namely, the right to the relief sought by his bill of a discovery by the defendants of "all sums of money or property received by them, or either

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of them from, the said C. I. Johnson" (the father of Mrs. Mundy and the plaintiff) in his lifetime." The order denied to the plaintiff that relief. If such relief had been granted to him, notwithstanding his waiver of answer under oath, the rights of the plaintiff would have been finally worked out by the court in the cause by having to regard the gifts to defendants disclosed by their answer as facts proved therein, unaccompanied by proof of any explanation by defendants that the gifts were not intended as advancements; for, having gotten such admission of the *factum* of the gifts, the plaintiff would have had no need to call the defendants as witnesses in the case, and, it must be presumed, would not in that event have so called them. In such case, their father, with whom the transactions in question were had, being dead, the defendants would not be competent witnesses in their own behalf on the subject, and could not by their testimony as witnesses in the cause supply evidence of any explanation of the gifts. That situation would be much to the advantage of the plaintiff, since in cases of alleged advancements the mere *factum* of a substantial gift, unexplained, is in itself evidence that the gift was intended as an advancement. The latter may be inferred from the former (*Hill* v. *Stack*, 122 Va. 280, 94 S. E. 792); whereas the effect of the order complained of is to require that the plaintiff, in order to obtain discovery by answer of the defendants, must withdraw his waiver of answer under oath and by amending his bill require an answer under oath as to the specified interrogatories. Under such procedure, the admission by the defendants of the gifts would be accompanied by the statements in their answer, quoted in the above statement of the case, which would be explanatory evidence in behalf of defendants in the cause, to overturn which would require the production by the plaintiff of two witnesses, or one witness and corroborating circumstances, furnishing evidence to the contrary.

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And if the plaintiff has to resort to calling the defendants to the stand as witnesses to prove the *factum* aforesaid, such testimony will come accompanied by the explanatory statements contained in their answer as aforesaid, and this, too, would put the plaintiff in a worse position than if he could obtain proof of such *factum* by answer of defendants not under oath.

It is true that there is a *bare possibility* that the defendants might be able to produce other testimony than their own, proving declarations of the father accompanying the gifts to them and showing that they were not made as advancements, in which case the plaintiff would derive no ultimate advantage by obtaining the discovery he prays for in the form in which it is sought. Courts, however, do not deal with bare possibilities, but, in civil cases (with some exceptions which do not include the cause before us), with what is more probably true in accordance with the facts as actually presented; and upon the record in this case, and in view of the nature of the facts sought to be disclosed, it is most probable that no other testimony is in existence, or at least no other as direct testimony and of the same probative value is in existence, as that of the defendants, the donees of the gifts in question. Hence, we are satisfied from the record in the case before us, that if the plaintiff could have the order of the court below reversed, as he seeks to do, and then obtain the discovery he seeks, upon the terms upon which he seeks it, the evidence by which his rights must be finally worked out in the cause would be different from what it will be if the order is allowed to stand unreversed.

In *Lancaster* v. *Lancaster*, 86 Va. 201, at p. 204, 9 S. E. 988, this court said: "It is difficult, if not impossible, to define exactly what is meant by adjudicating the principles of the cause in such a way as to fit every case; but it must mean that the rules or methods by which the rights of the

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parties are to be finally worked out have been so far determined that it is only necessary to apply those rules or methods to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject matter of the suit."

This definition does not in terms precisely fit the case now before us, but almost so. The order in the instant cause determined *the rule of evidence* by which the rights of the parties are to be finally worked out, which is the same thing, in substance, as determining the rule by which the rights of the parties are to be finally worked out.

The case of *Smith* v. *Pyrites etc. Co.*, 101 Va. 301, 43 S. E. 564, cited by the defendants, does not bear on the question of whether the order under consideration adjudicated the principles of the cause.

For the foregoing reasons we are of opinion that the order complained of in the case before us adjudicated a principle of the cause and hence is appealable.

We come now to the question raised by the exceptions to the answer of the defendants for insufficiency, noted in the above statement of the case, and the assignment of error thereon.

The question thus raised and presented to us for decision may be stated as follows:

2. If a plaintiff, in a bill for equitable relief (which the court has jurisdiction to give independent of discovery), prays for certain disclosures of fact by the defendants, in aid of such equitable relief, but waives answer under oath, can the plaintiff except to the answer as insufficient because the respondents, although answering fully as to all other portions of the bill, fail to make the discovery asked for? In other words, can a plaintiff in such case waive an answer under oath, and yet compel discovery?

This question arises under the statute in Virginia (Pollard's Code 1904, sec. 3281) which was first enacted by the

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General Assembly at its session of 1883-4, and is as follows: "If the complainant in a suit of equity shall, in his bill, waive an answer under oath, or shall only require an answer under oath, with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be heard upon the bill and answer only; but may, nevertheless, be used as an affidavit with the same effect, as heretofore upon a motion to grant or dissolve any injunction, or upon any other incidental motion in the cause; but this shall not prevent a defendant from testifying in his own behalf, where he would otherwise be a competent witness."

This statute was taken from the 41st Rule of Practice of Federal Courts of Equity, as amended by the rules promulgated by the Supreme Court May 6, 1872 (*Throckmorton* v. *Throckmorton*, 86 Va. 770, 11 S. E. 289), which is in precisely the same language as the Virginia statute aforesaid.

The question under consideration is one which has not been heretofore decided by this court, and upon which the text-writers and the decisions in other jurisdictions are in conflict. Its correct solution is perplexed with difficulties, as is abundantly disclosed by the authorities on the subject. We are indebted, however, to counsel on both sides of the case for exceptionably able and illuminating arguments, and pertinent citations of authorities, and references to the fundamental principles involved.

The plaintiff in the cause before us takes the position, that under our statute full answer will be required, including the discovery prayed for in such a bill as that of the plaintiff, even though oath to the answer is waived; and the following authorities are cited and relied on to sustain such position, namely: 14 Cyc. 315; 1 Bates' Federal Eq.

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Pr., sec. 118; *Colgate* v. *Compagnie Francaise, etc.* (C. C. Dist. N. Y.), 23 Fed. 82; *Whittemore* v. *Patten*, (C. So. Dist. Cal.), 81 Fed. 527; *National, etc. Co.* v. *Interchangeable, etc. Co.* (C. C. Mo.), 83 Fed. 26; *Uhlman* v. *Arnholt, etc. Co.* (C. C. Pa.), 41 Fed. 369; *Slessinger* v. *Buckingham, etc.* (C. C. Cal.), 17 Fed. 454; Foster's Fed. Pr. (4th ed.), p. 553; and *Manley* v. *Mickle*, 55 N. J. Eq. 563, 37 Atl. 738.

The defendants, on the other hand, take the position that a discovery, *ex vi termini*, requires an answer under oath. That that is the essential ingredient; that without the oath there can be no "searching of the conscience," no obtaining of *evidence*, and consequently no discovery; and that, hence, the plaintiff, having waived an answer under oath, cannot compel the discovery prayed for; and the following authorities are cited and relied on to sustain such position: *Roanoke St. Ry. Co.* v. *Hicks*, 96 Va. 510, 32 S. E. 295; *Union Bank* v. *Geary*, 5 Pet. 99, 8 L. Ed. 60; *Patterson* v. *Gaines*, 6 How. 550, 12 L. Ed. 553; *Huntington* v. *Saunders*, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; 1 Street on Federal Eq. Pr., sec. 789, p. 476; *Field* v. *Hastings* (C. C. N. Dist. Iowa), 65 Fed. 279; *Tillinghast* v. *Chace* (C. C. Mont.), 121 Fed. 435; *Colohan* v. *Holland Cook Mfg. Co.* (D. C. Wash.), 201 Fed. 607; *Victor G. Bloede Co.* v. *Carter* (C. C. Dist. N. Y.) 148 Fed. 127; *Excelsior Wooden Pipe Co.* v. *City of Seattle*, 55 C. C. A. 157, 117 Fed. 140; *Shepherd* v. *Akers*, 1 Tenn. Ch. 326; *Smith* v. *Insurance Co.*, 2 Tenn. Ch. 599; *Markham* v. *Townsend*, 2 Tenn. Ch. 713; *Streeter* v. *Braman*, 76 N. J. Eq. 371, 74 Atl. 659; and *Daab* v. *N. Y. &c. Ry. Co.*, 70 N. J. Eq. 489, 62 Atl. 449.

There is a statute on the subject in Rhode Island and orders of court in Massachusetts and New York, which are so different from the Virginia statute that we leave out of consideration the decisions from those States cited and referred to in argument, although they have been carefully examined and considered.

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The authorities cited, both for the plaintiff and the defendants, are in accord in the view that in the absence of statute, or some rule of court authorizing it, there can be no discovery compelled by a bill waiving answer under oath. All the authorities are in accord in the position that by the ancient and firmly established rule of the forum of chancery no discovery could be compelled except by answer under oath. The conflict in the authorities has arisen over the question whether such a statute as that we have under consideration, or a similar statute, or rule of court, has changed the established rule of procedure in chancery just mentioned.

Whether the discovery is sought by a pure, or a mixed bill of discovery, or by a bill for other equitable relief and for discovery in aid of such relief (as in the cause before us), is immaterial, insofar as the precise point is concerned of whether any discovery can be compelled by answer not under oath. There are marked differences between the use which may be made of the discovery when obtained; the force and effect of it as evidence; and when the plaintiff is entitled to discovery, in cases of the different characters of bills in equity seeking discovery, some of which throw some side lights upon the question we have under consideration, but they are not of sufficient help in the decision of that question to justify taking up here the space that would be required to consider them in detail. Such differences are well understood. They are set forth in the text-writers and decisions on the subject. It is deemed sufficient here to say that all the authorities concur in the position that that feature of all bills in equity which seeks discovery, whether the bills are technically bills of discovery or not, had its origin because of the inadequacy of the common law, in that it did not permit the parties in interest, or to a suit, to be examined as witnesses, nor provide any means for compelling a party to produce

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books or documents, however necessary they might be to the suit or defense of another. The immediate object of discovery in all bills in equity was, in its origin, and still is, *not to obtain relief*, but *evidence*. The discovery enables "one party to search the conscience of his antagonist and to compel him to make disclosures upon oath of facts necessary to the preservation of the rights of the former, which he otherwise might not be able to prove." *Roanoke Street Ry. Co.* v. *Hicks, supra* (96 Va. 510, 32 S. E. 295).

We will notice here, however, that some of the authorities cited by the defendants go to the length of holding that, since the enactment of the modern statutes in England and most if not all of the United States, which have abolished the restrictive rule of the common law above adverted to, and which authorize the examination of parties to an action or suit as witnesses, by interrogatories or otherwise, and provide for the compelling of the production of books and documents, the jurisdiction of courts of equity to compel discovery has been abrogated, or has become obsolete; and that holding is urged by the defendants upon our favorable consideration. We do not, however, concur in that view, except, perhaps, as to cases of mixed bills of discovery, where the jurisdiction at law is sought to be transferred to a court of equity, on the sole ground that discovery in equity is necessary. *Colgate* v. *Compagnie Francaise, etc., supra*, 23 Fed. 84-5; *Larkey* v. *Gardner*, 105 Va. 718, 54 S. E. 886. On principle, and in accordance with the great weight of authority, we think that (except in cases of mixed bills of discovery) where the statute law on the subject does not expressly abrogate the jurisdiction of courts of equity under consideration (and the statute law in Virginia does not), that jurisdiction still exists. Hogg's Eq. Pr., sec. 162; 6 Ency. Pl. & Pr., pp. 736-740; 2 Beach Mod. Eq. Jur., sec. 855. Moreover, except in a case of a mixed bill of discovery, as to which a different

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rule prevails, it has been long well settled, as the result of the development of equity jurisdiction, that a plaintiff in equity is not confined in his right to discovery to cases where he cannot otherwise prove the facts sought to be supplied in evidence by means of discovery, but he "may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense." Story's Eq. Pl., (10th ed.), sec. 845; 4 Minor's Inst. (2nd ed.), p. 1310.

However, although we are of opinion that the court below had jurisdiction in the cause before us to compel the discovery prayed for in aid of the other equitable relief sought therein, if sought by bill requiring the discovery by answer under oath; the question remains did it have power to do so by requiring the discovery to be made by answer not under oath?

Reverting again to the authorities cited pro and con by the plaintiff and defendants, as above noted, an examination of them discloses that those cited by the defendants have, for the most part, kept clearly in view the double function served by an answer in a suit in equity, under the procedure established in that forum, which is set forth by the text-writers and decisions on the subject. As said in Story's Eq. Pl. (10th ed.), sec. 850: "An answer in cases where relief is sought, properly consists of two parts; and in fact performs a double office. It consists, first, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath, as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually addressed.

"It combines together, therefore, two proceedings, which in the civil law are completely separated; and which are also separated in the practice of the ecclesiastical courts * * In the civil law, as we have seen, the defendant first puts in his defensive allegation to the claim made by the plaintiff; and after an answer to that is put in, the plain-

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tiff propounds, in a sort of supplemental libel, called the *libellus articulatus*, his interrogatories respecting the charges made in the positions of the plaintiff, as they are called (that is in the bill of complaint); and the defendant then responds to these interrogatories. In the ecclesiastical courts, where also the defendant is required to make an answer or discovery upon oath, the answer to the interrogatories is a wholly distinct instrument from the responsive allegation (as it is called) to the libel, which contains the defense of the defendant. In a bill in equity both of these distinct parts are united in one instrument, called an answer; and this ambiguity in the use of the word *answer*, importing this double sense and office, has sometimes led to erroneous decisions and to no small confusion in language." Mr. Minor, 4 Minor's Inst. (2nd ed.), p. 1311, also refers to this double function of an answer, and says: "* * the ambiguity arising from this source has led to some confusion."

And we find from an examination of the authorities cited for the plaintiff, that while most of them recognize the two functions of an answer above adverted to—the first, that of a pleading, and the second, that of supplying testimony or documentary evidence—they confuse, or do not clearly distinguish between the two functions, and permit the ambiguity, to which Mr. Minor and Judge Story refer, to becloud their reasoning. To illustrate: Such authorities, to a large extent, address themselves to the consideration of the broad question of whether an answer to a bill seeking discovery, which waives answer under oath, is subject to exception for insufficiency for any cause whatsoever; and they are supported by good reason and by the greater weight of authority, as we think, in the conclusion that such an answer is subject to certain exceptions for insufficiency. But when examined those exceptions, for the most part, prove to be exceptions that would lie to the answer merely as a pleading. For instance, in the case of *National, etc.*

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Co. v. *Interchangeable, etc. Co.*, supra (83 Fed. 26), strongly relied on by the plaintiff, in referring to the waiver in the bill of an answer under oath, the following is said in the opinion of the court: "It has nothing to do with the answer as a pleading, and the rule prevails that the defendant must answer fairly and fully to each and every material fact alleged in the bill. This fair and full answer should serve the purpose of eliminating many undisputed facts from the case. If facts alleged by complainants are admitted by the defendant in his answer, the necessity for consumption of time and expenditure of money in making proof thereof does not exist, and the court's attention is drawn to the debatable issues only. The power of the courts to require such an answer ought not to be abridged at all. * * " The same position, as to the right of the plaintiff to require a full answer, responding to all the material allegations of the bill, is taken by practically all of such authorities, and that exceptions for insufficiency will lie to an answer for its shortcomings in this regard. But this can be said of every answer as a pleading, which is defective in that respect. For there is a difference between the requirements in equity of the contents of an answer as a pleading from what is required of a pleading of a defendant at law. As said by Mr. Minor of an answer: "It is not enough that it contains a general denial of the matters charged, nor even of each specific matter severally." 4 Minor's Inst. (2d ed.), p. 1312. "The answer must respond to all the material allegations of the bill, either confessing and avoiding, or traversing *each one*, not *literally* only, but according to its substance." *Idem.* (The italics are Mr. Minor's). " * * a general traverse was never adequate in equity practice even considering the answer as a mere pleading, and there is no reason to suppose that waiving the oath has changed the law on this point." 1 Street's Fed. Eq. Pr., sec. 786. The answer, as a pleading, may traverse each and all of the material allega-

sooner.

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tions of the bill directly, distinctly, categorically and unequivocally, but that is not enough, if the plaintiff insists upon a full answer. It must go further and state affirmatively the facts constituting the defense of the respondent, whether that defense is in conflict, in whole or in part, with the allegations of fact in the bill, or is in confession and avoidance. As Mr. Hogg says, in his valuable work on Equity Pleading, in reference to an answer: "Its real purpose is to apprise the plaintiff of the extent and nature of the defense offered to the bill, and so inflexible is this principle that a defendant can avail himself of no matter of defense not stated in the answer, even though it is established by the evidence." 1 Hogg's Eq. Pr., sec. 397, p. 471. See to the same effect, 1 Street's Fed. Eq. Pr., sec. 744, and citation from Daniel's Ch. Pr. A pleading of a defendant at law often times does not do this. It is for that reason statutes have been enacted allowing the statement of the grounds of defense to be required under certain circumstances in actions at law, in addition to the pleadings. It is true that under statute in Virginia the plaintiff may have the cause set for hearing without any answer whatever, in which case, by virtue of the statute, the bill is taken for confessed. Or, if the defendant answers, and answers only a part of the allegations of the bill, if he denies knowledge as to the facts not denied, it is sufficient, under the practice in Virginia, to put such facts in issue. 1 Hogg's Eq. Pr. sec. 404, p. 482. And also, under the Virginia practice, the defendant in his answer may neither admit nor deny those matters of fact not within his own knowledge and call for strict proof of them (*Idem*, sec. 403, p. 480), which will put them in issue. And, after decree, where an answer is filed, however imperfect it may be to put in issue the allegations of the bill, it will be treated as a traverse of all of such allegations. The decisions cited bye defendants, t the point that an answer to a bill waiving

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answer under oath constitutes a traverse of the allegations of the bill, go no farther than that holding. See *B. & O. Ry. Co.* v. *City of Wheeling*, 13 Gratt. (54 Va.) 62; *Jones* v. *Christian*, 86 Va. 1017, 11 S. E. 984; *Millhiser* v. *McKinley*, 98 Va. 207, 211, 35 S. E. 446. None of the foregoing considerations, however, touches upon the right of a plaintiff in all equity suits to insist upon and to compel an answer, and a full and complete answer, as a pleading, in accordance with the rules of the forum. 4 Minor's Inst. (2d ed.), p. 1316. And, although it is true that under section 3275 of the Code a defendant may be allowed, under certain restrictions, to file his answer at any time before final decree, that does not affect the right of the plaintiff, by the proper proceeding, to have the court compel him to answer sooner.

And there are other requirements of an answer as a pleading, besides those above mentioned, which, according to the rules of the forum, the plaintiff is entitled to insist upon. Among those are the following: The defense set up in the answer should be a sufficient defense; and the plaintiff is entitled to insist upon an answer, not only according to the "knowledge" of the defendant, but also "as to his remembrance, information and belief." 1 Daniell's Ch. Pr. (5th ed.), t. p. 722; 4 Minor's Inst. (2d ed.), p. 1317. Exceptions will lie to an answer as a pleading, if deficient in any of these matters.

To the extent, therefore, that the authorities relied on by the plaintiff go in taking the position that an answer not under oath is not free from all exception for insufficiency, we consider them correct in their holding. And as some of the authorities cited by the defendants go to the extent of holding that an answer not under oath is free from all exception for insufficiency, and as that view is urged by defendants, we feel that we should say that we do not approve of that holding.

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But we cannot assent to the correctness of the conclusion of the authorities cited by the plaintiff, that the requirements of modern equity procedure as to affirmative statements of defense in an answer, when considered merely as a pleading, lead to the result of allowing a plaintiff to compel a respondent to go beyond traversing each and all of the material allegations of the bill and giving an affirmative statement of facts constituting his own defense, and compel him to also add a statement of facts not a part of his defense, but a part of the plaintiff's case, and which the plaintiff needs and seeks as *evidence* to support his case.

Doubtless, as said in 1 Street's Federal Eq. Pr., sec. 786: "What should now go into an answer considered as a mere pleading may well be very different from what would have been necessary to put in it if there had never been anything in the answer but matter of pleading. In the development of the answer as a pleading, the principle of discovery has exerted an influence that must constantly be taken into account;" but this consideration falls short of establishing the conclusion that without the aid of statute, or rule of court, so providing, a fixed rule of procedure can be changed so as to make a pleading not under oath serve the function of supplying *evidence.*

In the case of *Sheppard* v. *Akers, supra* (1 Tenn. Ch. 326), the statute involved was as follows:

"The plaintiff may, in his bill, waive an answer from the defendant under oath, in which case the answer will be entitled to no more weight than the bill as evidence." (Acts 1855-6, ch. 108, 2 Laws of Tenn. sec. 4317).

The court in that case by the language of the decision went to the broad extent of holding that no exception for insufficiency will lie to an answer not under oath. But it is apparent that the court had in mind that function, or office, of an answer which serves the purpose of supplying evidence. The opinion, after reviewing a number of au-

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thorities concerning the practice of disallowing exceptions for insufficiency to an answer not under oath, says: "The reason for the practice is that the answer is not evidence. The courts have considered it inequitable to allow the complainant to sift the conscience of the defendant for admissions to be used against him, when the complainant has declined to allow him any of the benefits of the disclosure. A better reason, perhaps, is that the complainant has no right to call for a discovery, when he himself, by waiving the oath, has declared that he does not stand in need of it. The idea of sifting the conscience of a party without the instrumentality of an oath is, moreover, contrary to the very theory of chancery proceedings. * * *" See to the same effect *Smith* v. *Insurance Co. supra* (2 Tenn. Ch. 599), in which it is said: "No doubt exceptions will lie to the sufficiency of an answer as a pleading, as well as to its sufficiency as a discovery." But the latter case, in addition to holding that no exception will lie to the sufficiency of an answer as a discovery, where the answer is not under oath, takes the view that an answer is nothing more than a discovery as to all matters of substance contained in its allegations beyond the traverse of the allegations of the bill, and that a defendant cannot be compelled to do more than traverse the allegation of the bill when answer under oath is waived. As stated above, we are not disposed to go to that length in our holding. We think that the plaintiff is entitled to insist that an answer shall go beyond the mere traverse of the allegations of the bill, to the extent of stating affirmatively the facts on which the defendant relies as a defense to the bill. We do not think, however, that such statement in the answer after the traverse aforesaid, need go, or that the defendant can be compelled to go, beyond the allegations of the facts on which he relies, in an answer to a bill which waives answer under oath.

It should be also noted that the authorities relied on by

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the plaintiff take the position that, because the admissions, which may be made in an unsworn answer, may be used by the plaintiff as evidence in his favor, it cannot be said that an unsworn answer is not evidence. The fallacy in such reasoning is apparent. Admissions of parties, made in the course of judicial proceedings are, it is true, in a certain sense admissible as evidence, but the ground on which they are so admissible is that they constitute a waiver of proof. 1 R. C. L., sec. 4, p. 469. Such admissions are, of course, made in mere pleadings. It is obvious, therefore, that the conclusion does not follow, because admissions may be *voluntarily* made in an unsworn answer, that a defendant may be *compelled* to make admissions and thus supply *evidence* in a cause by such an answer. And the reasoning under review overlooks the consideration that if the unsworn answer is in truth *evidence*, it would be so as a whole, and, insofar as the answer is responsive to the material allegations of the bill, not only would the admissions be evidence for the plaintiff, but its adverse responsive statements would necessarily be evidence also, and evidence against the plaintiff.

Of the authorities cited by the plaintiff the following should be further observed:

With respect to the federal decisions so cited, as pointed out in 1 Street's Fed. Eq. Pr. sec. 785, p. 475, the federal equity rule 40 declares that "the defendant must give discovery on any and every statement of the bill, though no particular interrogatories based on such statement are attached to the bill." Such rule, when read along with equity rule 41 aforesaid, would lead to the expectation that the decisions in the federal courts on the subject we have under consideration would be more favorable to the position of the plaintiff, than elsewhere, as in Virginia, where we have no such rule as federal equity rule 40, nor any statute to that effect.

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But what is more dissuasive of the soundness of the decisions of the federal courts relied on by the plaintiff, is that they are merely circuit court cases, and that in the latest decisions of the federal courts (which are among those cited by the defendants), the holding is to the contrary, namely: that under said federal equity rule 41, where a plaintiff in his bill waives an answer under oath, he cannot except to the answer for insufficiency because it fails to make the discovery prayed for.

The case of *Tellinghast* v. *Chace, supra,* 121 Fed. 435, in particular, besides citing with approval many of the authorities relied on by the defendants, contains a review of all of the authorities relied on by the plaintiff in the cause before us, and of the same position which is taken by the latter, the court says: "But there is presented no decision of the Supreme Court, or of any circuit court of appeals, for this position; and it seems contrary to principle. The cases cited by Bates cannot be accepted as sufficient authority to overthrow so well established a principle as that a complainant who waives an oath cannot have discovery. * * * An allegation of fact may be put in issue by an unsworn answer, but an interrogatory propounds a question, and neither at common law nor in equity can an issue be framed upon a mere question."

The view is taken in 1 Street's Fed. Pr. sec. 787, that, "In the later federal decisions a distinction is drawn between the allegations of the bill and interrogatories attached to the bill." We do not so read such decisions. Certainly in the case of *McFarland* v. *State Savings Bank, supra,* 132 Fed. 399, the decision is placed upon the same ground as it is placed in the cases of *Huntington* v. *Saunders, supra,* and *Tellinghast* v. *Chace, supra,* namely, that to entitle one to discovery the answer to interrogatories, *as to a bill of discovery,* must be under oath.

And while some of the federal cases, early as well as

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late, refer to the absence of interrogatories as one ground of denial of discovery, we have been unable to discover that the circumstance that discovery is prayed for by interrogatories, attached to the bill, rather than by interrogatories in the bill, is given any distinguishing weight by any of the federal decisions in their holding that discovery cannot be compelled by answer not under oath. For instance, in the case of *Excelsior Wooden Pipe Co., supra*, reported in 117 Fed. 140, and in 55 C. C. A. 157, it is said in the opinion:

"Upon the merits we are of opinion the judgment should be affirmed. The discovery feature of the bill may be disregarded—First, because the answer under oath is expressly waived in the bill; and secondly, because the bill propounds no interrogatories."

And in the case of *Victor G. Bloede Co* v. *Carter, supra*, 148 Fed. 127, the opinion says: "Rule 41 states in effect that so far as answers to interrogatories are waived, the answers thereto, although under oath, shall not be evidence in favor of the defendant, unless the case 'be set down for hearing on bill and answer only."

This apparently was to prevent a defendant from answering under oath, when an oath was not required, and claiming thereby the advantage of answering under oath. The defendants rely upon *Tellinghast* v. *Chace*, (C. C.) 121 Fed. 435; *McFarland* v. *State Savings Bank*, (C. C.) 132 Fed. 399. These cases hold precisely that the defendants may properly decline to answer the interrogatories seeking discovery attached to complainant's bill, when the complainant expressly waives an answer under oath. It is considered that they state the rule as it is and of right ought to be."

Of the case of *Colgate* v. *Compagnie Francaise, supra*, 23 Fed. 82, relied on by plaintiff, it should be noted that in its holding that a pure bill of discovery can be main-

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tained against a corporation as sole defendant, which (of necessity) answered not under oath, it is not in accord with the rule in Virginia, where it has been expressly decided that a bill of discovery cannot be maintained in such case, for the reason "that no one is made a party defendant who can answer under oath." *Roanoke Street Ry. Co.* v. *Hicks, supra,* 96 Va. 510, 32 S. E. 295. It should be further noted that by the later decision of the same federal court (U. S. Cir. Ct. Dist. N. Y.), in the case of *Victor G. Bloede Co. V. Carter, supra,* 148 Fed. 127, it is said of the *Colgate Case* that "it might be cited as authority that a bill of discovery must be answered although the oath be waived." (But) "there is much later authority to the contrary effect."

In the case of *Slessinger* v. *Buckingham, supra,* 17 Fed. 454, cited by the plaintiff, the bill did not waive and the answer was under oath, so that the question under consideration was not involved. But the court in its opinion, discussing the advantages of said equity rule 41, says: "It would seem that a discovery by answer under oath may now be advantageously waived by the complainant, in at least the majority of cases." Which would seem to take the view that if answer under oath was waived, the right to compel discovery would be waived also.

With respect to the New Jersey case of *Hanley* v. *Nickle, supra,* 55 N. J. Eq. 563, 37, Atl. 738, (which it may be noted is the only authority cited by 14 Cyc. 315, also relied on by plaintiff), which is especially relied on by the plaintiff, an examination of that case discloses that the waiver of oath was by a cross-bill and the disclosures prayed for therein were, in truth, matters of fact, statements of which should have been contained in the original bill, therefore, while discussed in the opinion in that case, the question we have under review was not involved therein.

Further: In the later case in the same court (of New

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Jersey) of *Daab* v. *N. Y., etc. R. R. Co. supra,* 70 N. J. Eq. 489, 62 Atl. 499 (cited by defendants), such court has taken a position contrary to the *dictum* in the earlier case just mentioned, and expressly limits the *Manley* v. *Mickle* case to the role of laying down a permissive rule of practice allowing a defendant to make voluntary admissions. The latter case expressly holds that such admissions cannot be compelled when answer under oath is waived in the bill. In that case the bill sought the relief of accounting and prayed for discovery by the defendant, in aid of that relief, of certain accounts, as shown, as alleged, by the books and papers of the latter.

The New Jersey statute on the subject in force when both of the decisions next above mentioned were rendered (as contained in the laws of New Jersey 1867 p. 166 and 1902 p. 517), is as follows:

"The complainant may, in any bill in chancery, pray that the defendant answer without oath, in which case the answer need not be sworn to, and the allegations and statements therein, whether responsive or not, shall not be evidence against the complainant, except on a motion to grant or dissolve an injunction, on which motion the statements and denials in an answer duly sworn to, shall have the same effect as heretofore; and when an answer without oath is so prayed, the complainant may annex to the bill interrogatories, founded on statements in the bill, and the same, or any part thereof, may be addressed to all or any of the defendants, and each defendant to whom such interrogatories are addressed, shall answer the same, under oath, or affirmation, fully, directly and responsively, confining the answer to the interrogatories proposed; and such answers shall be annexed to the answer to the bill, be filed therewith, and be liable to be excepted to, as a part of the answer; and so far as responsive to such interrogatories shall have the same effect as responsive allegations in

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answers required to be sworn to; and any defendant omitting to answer any such interrogatories directly and fully may be compelled so to do, or the allegations in the bill upon which the interrogatory is founded shall be taken as admitted to be true, and a decree made thereon accordingly."

The New Jersey court, in the *Daab Case,* in its opinion says:

"The bill prays for an answer without oath. If the jurisdiction of this court in a case like this could be extended, because the complainant has a right to discovery, which I do not admit, such result would follow, as it seems to me, only in case discovery in the ancient sense of the term were sought. Discovery means production of evidence. When the answer is not under oath, the defendant's statements are not evidence in the cause against the complainant. They may be admissions, and as such evidence against the particular answering defendant who makes them. An answer in chancery originally had a dual capacity. It was a mere pleading to aid in defining the issues to be tried and also a means of obtaining evidence not otherwise procurable. Our statute (Laws 1867, p. 166), Chancery Act, 1902, sec. 19 (Laws 1902, p. 517), permitting the plaintiff to call for an answer without oath, gives the complainant the option to obtain from his adversary a pleading which has no force as evidence, except so far as the defendant may see fit to make admissions. This statute, however, expressly provides that the complainant, while calling for an answer without oath, may annex interrogatories to his bill to be answered under oath with the same effect as evidence 'as the responsive allegations in answers required to be sworn to.' The statute plainly permits the defendant to procure an answer which is a mere pleading, and also to force the defendant to make discovery under oath in regard to any parts of the case

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concerning which he sees fit to call for such discovery. Notwithstanding this special provision for interrogatories to be answered under oath, the practice is established of permitting the complainant to submit interrogatories in his bill to be answered without oath, and this procedure is considered a mode of obtaining discovery. *Manley* v. *Nickle*, 55 N. J. Eq. 563, 37 Atl. 738 (1897). The last mentioned decision of the court of errors and appeals, however, in my opinion, lays down merely a rule of pleading. The complainant, according to the doctrine of the case, has a right to present to the defendant the opportunity of making admissions, not only in regard to the allegations of the bill, but also in regard to matter of evidence which will be dealt with on the trial, which admission, if made, may be useful to the complainant * * *. Under no theory, in my opinion, can the jurisdiction of this court to decree an account be sustained on the ground that the complainant has the right to invoke the aid of the court for discovery, when the complainant waives an answer under oath and submits no interrogatory to be answered under oath, but abandons altogether the use of the answer as a means of putting the defendant under oath in the cause in advance of the trial, and thereby elects to have the answer stand as a mere pleading."

Before coming directly to the consideration of the proper interpretation of the statute in Virginia, above quoted, we think the following general considerations should also be had in mind.

There is no controversy over the proposition that in the absence of statute, or rule of court, or express leave by order of court, answers in all suits in equity must be under oath, except the answers of corporations, infants, committees of persons of unsound mind, guardians *ad litem*, and, in England, persons entitled to the privilege of peerage, the Secretary of State for India and the Attorney General,

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which need not be under oath, unless required by statute in some statutory proceedings. 1 Daniell's Ch. Pr. (5th Am. ed.), top pp. 735-8; 1 Hogg's Eq. Pr. sec. 158. And under the practice in England, as laid down in 1 Daniell's Chy. Pr. last cited, leave of court was required for a guardian *ad litem*, or committee or person entitled to the privilege of peerage to file an answer not under oath. The practice also grew up in England of the putting in of answers by others not under oath, or without oath and without signature, especially in amicable suits, where the plaintiff asked therefor or consented thereto; but such answers could not be received except under order of court first obtained. 1 Daniell's Ch. Pr. (5th Am. ed.), top pp. 736-8. And the learned author last cited says in the text of the work last quoted, at top pp. 737-8: "If the answer is to be put in without oath or signature, the consent of the party not applying is requisite. It is usual for the plaintiff's solicitor to require to see the draft or a copy of the proposed answer, before applies or consents to the defendant's application, in order that he may be satisfied that it is sufficient; as no exception can be taken to an answer put in without oath, or signature, or attestation of honor." Citing *Hill* v. *Earl of Bute*, 2 Fowl. Ex. Pr. 10.

We find the last named case also referred to in *Sheppard* v. *Akers*, *supra*, 1 Tenn. Ch. 326, as cited by 1 Hoffman's Ch. Pr. 240, to sustain the statement of the text of the latter, that "the general rule is that exceptions cannot be taken to an answer without oath, or upon protestations of honor." The report of the case referred to in 2 Fowl. Ex. Pr. 10 is very brief and somewhat obscure. After stating the holding in another case (*Strudwick* v. *Pargiter*, Bunb. 338) to be that, "Exceptions cannot be taken to the answer of an infant, because he is not bound by it, but may amend it when he becomes of age," it continues, and contains only the following report of the *Hill* v. *Earl Bute Case*

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(which will be here quoted in full as this report can be found in only one library in this country, as we are informed—the Harvard Law Library—to whose librarian we are indebted for access to it), as follows:

"Nor to an answer put in without oath, as appears by the following case. Mr. *Rickards* showed exceptions for cause against an order for dissolving the injunction. Mr. *Mitford,* for defendant, opposed the cause shewn, for that the answer was taken without protestation of honor, by consent of the plaintiff, and that it was the established practice of the court of chancery, that you cannot take exceptions to an answer put in without oath. *Per curiam,* these answers are considered as matters of form only; and had this been the first case that had occurred of the kind, we should have ruled, that no exceptions can be taken in such a case. *Hill* v. *Earl of Bute, 9th May, 1786, in Scac.*"

We see then that the point decided in that case was not that an answer put in without protestation of honor, or without oath, was for those reasons free from exception for insufficiency as a pleading, interposed for the purpose of compelling a fuller answer, but that such an answer having been filed by consent of the plaintiff (after inspection of it, doubtless, in accordance with the practice referred to in Daniell's Ch. Pr. above quoted) no exceptions could be taken by the latter to the contents of the answer. A very different holding. On the other hand, insofar as such case holds, in effect, that such an answer, although not under oath, when once put in in that form (the defendant thus accepting the waiver of answer under oath by the plaintiff) might be read as evidence, that touches a question of practice which, as we shall presently advert to, was at one time the subject of a diversity of opinion in this country, and that question was settled in this State, as we shall presently see, by the statute above quoted on which appellant relies in the cause before us. But that, in turn, is a differ-

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ent question from that of the right of a plaintiff to compel a defendant to file an answer which shall perform the function of supplying evidence, when an answer under oath is waived by the plaintiff.

See Am. note to 1 Daniell's Ch. Pr. (5th ed.), top p. 760 and *Ohlman* v. *Arnholt, etc., supra,* 41 Fed. 369, for discussion of whether the lack of oath to answers of infants, etc., is the fundamental reason why discovery cannot be compelled of certain defendants. Whatever may be the true position on the latter subject, however, it is not vital to the decision of the question we have before us.

See also note to 5 Am. & Eng. Dec. in Equity, page 468 *et seq.* for a general treatment of the subject of waiver of oath to bill for discovery and for a very extensive citation of authorities.

In some of the jurisdictions of the United States, prior to any standing rule of court, or statute, on the subject, a practice grew up similar to that above mentioned as obtaining in England. Under such practice the question most often considered by the courts was what was the force and effect of an answer not under oath put in by consent of the plaintiff. Story's Eq. (10th ed.), secs. 874, 875-a. Mr. Minor takes the view that it should be held, on principle, that "the issue being joined by means of the answer, the *law of the forum* would exact a like measure of proof in opposition to the answer, as if it had been made under oath; and" (says Mr. Minor "of that opinion was Ld. Eldon, in *Curling* v. *Thompson,* 19 Ves. 630-31. But" (he adds) "see an elaborate *dictum* to the contrary in *Union Bank* v. *Geary,* 5 Pet. 111-12, 8 L. Ed. 60, and also *Smith* v. *Clark,* 4 Paige (N. Y.) 368; and a further *dictum* to the contrary is found from Judge Moncure, in *Balt. & O. R. R. Co.* v. *Wheeling,* 13 Grat. (54 Va.) 62." 4 Minor's Inst. (2nd ed.), p. 1327. And see *Thornton* v. *Gordon,* 2 Rob. 719, 725-7, cited by Mr. Minor at p. 1326. It would unduly pro-

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long this opinion to refer to the decisions on this branch of the subject in other States, as they are very numerous. But, as pointed out in the note to sec. 874 of Story's Eq. Pl. above cited, the practice above referred to of allowing the defendant to answer not under oath by consent of the plaintiff was not attended with any power to *compel* the defendant to so answer and thus make discovery. On the contrary as pointed out in such note—"It is well settled that a waiver in the bill of an answer under oath is of no effect, if not accepted by the defendant, and does not deprive an answer under oath of its ordinary effect as evidence," citing numerous authorities. This, of course, has reference to such practice prior to any standing rule of court or statute governing the subject. Such was the settled rule of practice in Virginia prior to any statute on the subject. *Fant* v. *Miller*, 17 Grat. (58 Va.) 187; *Jones* v. *Abraham*, 75 Va. 466.

We think, therefore, that the United States Circuit Court of Appeals was correct, in part, at least, in its holding above quoted, in the case of *Victor G. Bloede Co.* v. *Carter*, *supra* (148 Fed. 127), that the object of the adoption of the Federal Equity Rule 41 aforesaid "was to prevent a defendant from answering under oath when an oath was not required and claiming thereby the advantage of answering under oath." That is to say, one of its objects, at least, was to alter the practice, established as aforesaid, by the decisions prior to such rule, that the waiver in the bill of an answer under oath was of no effect if not accepted by the defendant. Doubtless, another object of such rule was to settle the question adverted to by Judge Story and by Mr. Minor, as above noted, as to the force and effect as evidence of an answer *not* sworn to, "supposing the oath to have been dispensed with" (to use the language of Mr. Minor), to which the latter refers as one of the "principal questions" which had been raised. 4 Minor's Inst. (2nd

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ed.) pp. 1326-7; Story's Eq. Pl. *supra*, sec. 875a. And we are of opinion that these were the objects of the enactment of the Virginia statute in question, and not any purpose to change the established rule of equity procedure which required, and still requires, as we think, an answer under oath as inseparable from the right to compel a discovery by answer in a suit in equity.

The statute does not, indeed, by its terms purport to provide under what character of bill discovery may be had, or to change or affect the long established rule in courts of equity that bills praying for discovery must require answer under oath, and that an answer, to perform that function of it which supplies *evidence*, must be under oath. The statute, by its language, deals merely with the force and effect of the answer as evidence, in suits in equity, when the plaintiff shall in his bill waive answer under oath, or shall only require an answer under oath as to certain specified interrogatories. It expressly contemplates a continuance of the practice of bills in equity requiring "an answer under oath with regard to certain specified interrogatories," (*i. e.*, a continuance of the long established procedure by which alone discovery could be compelled), in which case it provides, in effect, that such parts of an answer as shall be directly responsive to such interrogatories, shall have the same force and effect as evidence as aforetime. If it meant to provide that discovery could be had without "an answer under oath with regard to certain specified interrogatories," it did a vain thing in making any mention of that subject, since it is obvious that no practitioner would ever place upon his client the *onus* of obtaining a discovery by sworn answer, when he could have the same relief by praying for an answer not under oath, which would be unattended with the burden aforesaid incident to an answer under oath.

Our conclusion, therefore, is that the plaintiff in the cause before us, having waived answer under oath, was not entitled to compel the discovery asked for in the bill.

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Only one other point is urged in argument by the plaintiff, which is not assigned as error in the petition, but, as no objection is made by defendants to its consideration, we will pass upon it. The plaintiff takes the further position that

3. Having answered, the defendant must answer fully, and cannot avail of the waiver of oath.

The following authorities are cited to sustain this proposition, namely: 14 Cyc. 317, 319; Hogg's Eq. Pr., p. 238; *Manley* v. *Mickle, supra,* 55 N. J. Eq. 563, 37 Atl. 738, and 4 Minor (3rd ed.) 1425.

There is no doubt that "the strict and general rule" is, as stated by Mr. Minor, in the citation from that eminent author relied on by plaintiff, that "the defendant who has occasion to protect himself against discovery, must resort to a plea or demurrer, for if he answers at all, he must *in general* answer fully * *." And this same *general rule* is laid down in the other authorities cited and relied on by plaintiff on this point.

But even according to the strict rules of pleading, it is laid down in 1 Daniell's Chy. Pr. (5th ed.), top p. 718,— "* * the objection" (to discovery) "arising from want of materiality is one that the defendant has always been allowed to raise by answer." And on top page 720 of the same work it is expressly stated that, where such an objection is concerned, it constitutes an exception to the general rule "that when a party answers he is bound to answer fully." As pointed out in such work (top pp. 720-1) the rule last quoted "* * is applicable in all cases where the defense intended to be set up extends to the entire subject of the suit * * *." Again: this author says in the same work (top p. 582): "If a defendant objects to a particular part of the discovery, and the grounds upon which he may demur appear clearly on the face of the bill, and the defendant does not demur to the discovery, but, answering to the rest

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of the bill, declines answering to so much, the court will not compel him to make the discovery; * *." See, for same statement, *Idem*, top p. 722. Such is the case before us. The waiver of answer under oath, the objection to the discovery, appeared clearly on the face of the bill, and the defendants might have demurred to the discovery prayed for in the bill. Further: it is stated in 1 Hogg's Eq. Pr. sec. 160: "If the ground of objection to making discovery does *not* appear on the face of the bill, the defendant must claim exemption from making discovery by plea *or answer.*" (Italics supplied). And in *Manley* v. *Mickle, supra,* the statement relied on by plaintiff that complainants "having answered, they must answer in full," is qualified by the remainder of the sentence, "unless their objection to the particular interrogatory is well taken." Moreover, the decisions disclose that the practice is very general for a defendant, after having answered fully to all the material allegations of the bill, except the discovery he objects to, to decline to answer further. And the plaintiff thereupon, as in the cause before us, excepts to the answer for insufficiency because of its failure to make discovery as prayed for by the plaintiff. Such exception then puts in issue and presents to the court the question whether the defendant can be compelled to answer further and make the discovery. This was done in the case of *McFarland* v. *State Savings* Bank, supra, 132 Fed. 399. The defendants there answered the bill, but declined to answer the interrogatories. The court said: "The defendants having answered the principle allegations of the bill under oath, yet having declined to answer the interrogatories propounded, there is presented for decision the question whether the complainant having expressly waived an answer under oath, defendants may properly decline to answer the interrogatories seeking discovery * *." Indeed, in practically all, if not all, of the cases cited, both for the plaintiff and defendant, in the cause before us, that was the practice followed.

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We think, therefore, that certainly in the cause before us there is no merit in the position under consideration. The defendants having answered fully all of the allegations of the bill, except the interrogatory, they could properly refrain from answering further, as we have above seen; and, in a cause where the plaintiff himself has elected to and has followed such procedure, we can see no objection to the question being raised, whether they could be compelled to answer further, by the exceptions which were taken by the plaintiff to their answer, instead of its being raised by the defendants by demurrer or by plea.

For the foregoing reasons we find no error in the order complained of and it will be affirmed.

Affirmed.

BURKS, J., concurs in the results.

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Richmond.

MANOR AND OTHERS v. HINDMAN.

November 14, 1918.

Absent, Sims, J.

1. SALES—*Interpretation and Construction—Construction by Parties.*—The construction put upon contracts of sale by the parties themselves is accepted by the courts where it does no violence to the language used.
2. SALES—*Time of Delivery—Delivery on Installments.*—Plaintiff bought of defendants, who owned a flour mill at which they manufactured and sold large quantities of flour, 1,800 barrels of flour in October and November, 1914, for November and December delivery. It was understood by the parties that the purchaser intended to solicit buyers for the flour at a profit to himself in the territory near his place of business, and that the orders to ship directly to these buyers would be sent in to the sellers after such sales were made, together with proper specifications as to the size of the packages in which the flour was to be shipped. Under this contract, 902 barrels of flour were ordered and shipped, and on December 30th and 31st, the purchaser sent in to the sellers the specifications for 898 barrels, the balance due on the contract. The sellers declined to ship, and claimed that under the contracts they had the right to insist that the specifications should be received by them in sufficient time to enable them to manufacture and ship the flour on or before the 31st day of December.

   Held: That while it is doubtless true that if the sellers had claimed that their facilities were so limited that it was impossible to deliver 898 barrels of flour on the 30th and 31st of December, they should have been allowed a reasonable time in which to make such delivery, their claim that they had a right to time to manufacture the flour is untenable. They had sold the flour under the circumstances mentioned, and it was their duty to have it ready for delivery whenever it was called for during the months of November and December.
3. APPEAL AND ERROR—*Affirmance.*—In the instant case the trial court permitted each of the witnesses (the purchaser and a witness for the seller) to give to the jury his construction of

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the meaning of the term "ordering out," and used in the contract of sale, and instructed the jury in accordance with that evidence. The jury found a verdict in favor of the purchaser, and under the demurrer to the evidence rule the verdict will not be disturbed by the Supreme Court of Appeals, unless there was some error to the prejudice of the sellers committed during the trial.

4. PARTNERSHIP—*What Constitutes—Share of Profits.*—Where an employer had two clerks who were paid salaries and in addition to this were allowed a share of the net profits, in case the concern should earn such profits, but were in no event liable for any losses, there was no partnership between the employer and the clerks. The contingent interest of the clerks in the net profits was merely a means of measuring their salaries.

5. SALES—*Damages—Loss of Profits by Purchaser.*—If at the time a contract of sale is made, the seller has notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, and, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered.

6. SALES—*Damages—Loss of Profits by Purchaser.*—It is sometimes objected that a loss of profits is not a proper subject of compensation, and this is often true. It is not, however, because profits in themselves may not, if lost, be properly made the basis of a recovery, but because in most cases in which such a claim is made the profits in question are too speculative, uncertain or remote to be considered. Where, on the other hand, the loss of profits can be shown with reasonable certainty, a recovery may be had for the amounts so lost.

7. SALES—*Damages—Loss of Profits by Purchaser.*—A buyer who in the circumstances set out in syllabus 5, has made a subcontract, is entitled to obtain and supply the article which his vendor has failed to furnish under his contract, and if he is compelled to pay a higher price for the substitute thus procured, he may recover as damages the difference between what he was to pay for the original article and what he is thus compelled to pay for the substitute.

8. VERDICT—*Correction.*—It is the duty of the trial courts to require the verdicts of juries to be put in approved form in order to effectuate their true intent and meaning, and hence where the jury reported a verdict written upon a piece of paper in the following words: "We, the jury, find for the plaintiff and fix the damages due by the defendant to be

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twelve hundred dollars," there was no error where the verdict was in open court written upon the declaration and signed by the foreman in these words: "We, the jury, find for the plaintiff on the issues joined, and fix his damages at twelve hundred dollars."

9. JUDGMENTS AND DECREES—*Codefendants—Partial Invalidity.*—A judgment against a party who was not served with process and against whom the suit had abated is void as to her but not as to her codefendants, as it is an error that can and should be corrected under section 3451 of the Code of 1904.

10. NEW TRIAL—*Misconduct of Jury—Affidavits of Jurors.*—Affidavits of jurors as to misconduct of the jury are received with great caution, and only in exceptional cases and in order to prevent a failure of justice. In the instant case, which was one of a quotient verdict, there was nothing in the record to take the case out of the established rule.

Error to a judgment of the Circuit Court of Shenandoah county, in an action of assumpsit. Judgment for plaintiffs. Defendant assigns error.

Amended and Affirmed.

The opinion states the case.

M. L. Walton and *Geo. N. Conrad,* for the plaintiffs in error.

Sipe & Harris and *Tavenner & Bauserman,* for the defendant in error.

PRENTIS, J., delivered the opinion of the court.

The controlling facts of this case (omitting many matters of detail which appear to us to be inconsequential) are: That C. C. Hindman, trading as C. C. Hindman & Co., of Greenville, S. C., bought of the Harrisonburg Milling Company, a partnership composed of J. D. Manor, Blanch B. Manor, Marguerite L. Haywood and Shirley M. Sebrell,

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who owned a flour mill at which they manufactured and sold large quantities of flour, eighteen hundred barrels of flour in October and November, 1914, for November and December delivery. The negotiations and sales, evidenced by telegrams and letters, show that there were four sales, three of five hundred barrels each and one of three hundred barrels. It was well understood by the sellers that the purchaser intended to solicit buyers for the flour at a profit to himself in the territory near his place of business in South Carolina, and that the orders to ship directly to these buyers would be sent in to the sellers after such sales were made, and that proper specifications as to the size of the packages in which the flour was to be shipped, should be furnished. Operating in this way, 902 barrels of flour were ordered and shipped including the order of December 28th, 1914, leaving at that time 898 barrels due upon the contracts to the purchaser. On December 30th and 31st, the purchaser sent in to the sellers the specifications for these 898 barrels. The sellers declined to ship, and claimed that under the contracts they had the right to insist that the specifications should be received by them in sufficient time to enable them to manufacture and ship the flour on or before the 31st day of December. The substance of the controversy then is whether, under such contracts as have been described, the purchaser had the right to take the entire month of December in which to send in his orders with specifications.

One of the accepted rules is, that the construction put upon such contracts by the parties themselves is accepted by the courts where it does no violence to the language used. In this case, by letters dated November 6, 13 and 24, the sellers emphasize the fact that all of the flour is to be ordered out by December 31, 1914, and that all not so ordered out would be cancelled. It was not, however, until the letter dated December 31, 1914, that the sellers claimed specifi-

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cally that it was the duty of the purchaser to get specifications as to the size of the packages to them in time for them to manufacture and ship during the months of November and December.

There were only two witnesses, the purchaser and J. B. Manor, acting for the sellers. They were both permitted to testify as to the proper meaning to be attached to the words "ordering out" the flour, according to the custom and usage of the trade. The purchaser testified that "ordering out" meant sending in specifications for the flour, and that he had until the 31st of December under his contracts to send in such specifications, while the witness for the sellers testified that it meant that the shipper of the flour was entitled to have the specifications in time to enable the mill to ship the flour on or before the 31st of December.

One test to be applied to this contract is to inquire what would have been the obligation of the purchaser in case he had not sent in any specifications on or before the 31st day of December. As to this there can be no doubt whatever that he could not have taken advantage of his own failure to send in the specifications, and had the market price for flour depreciated so as to make it profitable to the sellers to require him to take all of the flour, he could have been held responsible to the sellers for the entire purchase price, and his failure to send in specifications would not have relieved him from the obligations of his contracts. A case like that where the seller sued the purchaser who had failed to send in shipping directions within the time required by the contract is *Louisville &c. R. Co.* v. *Diamond State Iron Co.*, 126 Ill. 294, 18 N. E. 735, in which the purchaser was held liable under his contract. A case quite similar to this is *Tyers and others* v. *The Rosedale & Ferryhill Iron Co., Ltd.*, 10 Law Rep. Ex. 195, in which the purchaser sued the sellers. There the sellers contracted to sell 2,000 tons of iron to be delivered during 1871 or sooner, in equal monthly

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quantities. In January 101 tons were delivered. Then the purchaser requested the sellers not to deliver more iron under the contract, and after that only partial deliveries were made up to and including November. Then in December the purchaser required the delivery of the residue of the whole 2,000 tons. The sellers refused to deliver and claimed that they were only liable to deliver such as was due on the monthly balance. The trial court decided that the purchaser could not require such delivery of the residue in December, and that the purchaser was therefore not entitled to recover; but the appellate court reversed the judgment in favor of the purchaser, saying, however, that they were probably entitled to a reasonable time in which to deliver the residue of the 2,000 tons.

So here it is doubtless true that if the sellers had claimed that their facilities were so limited that it was impossible to deliver 898 barrels of flour on the 30th and 31st of December, they should have been allowed a reasonable time in which to make such delivery. Their claim that they had a right to time to manufacture the flour is untenable. They had sold the flour under the circumstances mentioned, and it was their duty to have it ready for delivery whenever it was called for during the months of November and December. We may, we think, assume that there are standard packages of flour, and that in accordance with the custom of the business manufacturers of flour in large quantities have these packages on hand ready to fill orders which they are under contract to fill, and that reasonable time in which to assort and ship these packages after the specifications are sent in, is all the time to which the seller is fairly entitled.

The trial court permitted each of the witnesses to give to the jury his construction of the meaning of the term "ordering out" and instructed the jury in accordance with that evidence. The jury found a verdict in favor of the pur-

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chaser, and under the demurrer to the evidence rule it will not be disturbed by this court, unless there was some error to the prejudice of the appellants committed during the trial.

There were several exceptions as to the admission and rejection of testimony. It is sufficient to say, as to those, that they present no novel questions, and a discussion of the points raised would serve no good purpose. No testimony was admitted which the purchaser was not entitled to have considered by the jury, and none rejected which was tendered by the sellers which could have properly changed the result.

Much is said in the record as to one of the orders for 500 barrels of flour, referred to as the "Wright order." It appears that the purchaser desired the sellers to book or sell 500 barrels of flour to D. C. Wright, Belton, S. C. The sellers at first refused to do so and there ensued correspondence by letter and telegram which is obscure in its meaning. There are clauses in the correspondence which support the contention that this flour was sold directly to Hindman, the appellee, as well as clauses indicating a sale to Wright, but the general tenor of the correspondence supports the contention of Hindman that the sellers refused to confirm any sale to Wright, and held him, Hindman, responsible as the purchaser of this 500 barrels of flour, saying in their letter of November 10th, "It was not up to us to confirm the sale to Wright;" and the final confirmation of this view is found in the letter from Hindman, the purchaser, to the sellers of the 22nd of December, in which he directs 200 barrels of the flour to be applied to Wright's contract, but shipped at once to the Blue Ridge Grocery Co., of Pelser, S. C. This letter was introduced by the sellers, and there is nothing in the record to indicate that they disclaimed the right of the purchaser thus to control and direct the disposition of this portion of the flour.

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It is claimed that Hindman had no right to maintain the action in the name of C. C. Hindman & Co., upon the ground that he had co-partners. The evidence fails to sustain this proposition. He had two clerks who were paid salaries and in addition to this were allowed a share of the net profits, in case the concern should earn such profits, but they were in no event liable for any losses. Their contingent interest in the net profits was merely a means of measuring their salaries. *Jackson* v. *Haynie*, 106 Va. 365, 56 S. E. 148; *Tyler* v. *Jeter*, 75 W. Va. 217, 83 S. E. 906.

Complaint is made that the purchaser was allowed to testify as to his loss because of the sellers' failure to supply the flour which he was under obligation to supply to his customers under contracts which he made on the faith of his contracts with the sellers. The rule in such case appears to be perfectly well settled, and is thus stated in 2 Mechem on Sales:

"Sec. 1763. If, however, at the time the contract is made, the seller has such notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, that he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered." Citing many authorities.

"Sec. 1765. It is sometimes objected that a loss of profits is not a proper subject of compensation, and this is often true. It is not, however, because profits in themselves may not, if lost, be properly made the basis of a recovery, but because in most cases in which such a claim is made the profits in question were too speculative, uncertain or remote to be considered. Where, on the other hand, the loss of profits can be shown with reasonable certainty, it has been settled, since the case of *Masterton* v. *Mayor of Brook-*

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lyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, that a recovery may be had for the amounts so lost."

The buyer in such circumstances, who has made a sub-contract, is entitled to obtain and supply the article which his vendor has failed to furnish under his contract, and if he is compelled to pay a higher price for the substitute thus procured, he may recover as damages the difference between what he was to pay for the original article and what he is thus compelled to pay for the substitute. 2 Mechem on Sales, sec. 1768.

No evidence in contravention of this rule was admitted by the trial court.

Exception is taken because the jury reports a verdict written upon a piece of paper in the following words: "We, the jury, find for the plaintiff and fix the damages due by the defendant to be twelve hundred dollars:" whereupon the verdict was in open court written upon the declaration and signed by the foreman in these words: "We, the jury, find for the plaintiff on the issues joined, and fix his damages at twelve hundred dollars." It is the duty of the trial courts to require the verdicts of juries to be put in approved form in order to effectuate their true intent and meaning, and hence there is no merit in this exception. Indeed, if the verdict as originally drawn had been accepted by the court, the same result would have followed, for it would have been considered as responsive to the issue which the jury had been sworn to try.

The action was originally instituted against J. D. Manor, trading under the name of Harrisonburg Milling Company and J. D. Manor and Company. At the next term J. D. Manor filed a suggestion that the Harrisonburg Milling Company was a partnership composed of himself, Blanch B. Manor, Marguerite L. Haywood and Shirley M. Sebrell, and by consent the case was remanded to rules and process directed to issue, and no further allusion appears to J. D.

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Manor & Company. The new process accordingly issued and was executed upon each of the members of the partnership except Marguerite L. Haywood, as to whom the suit abated. Then at the next term a plea of *non assumpsit* was filed on behalf of J. D. Manor, Blanch B. Manor and Shirley M. Sebrell, upon which plea issue was joined, and this was the only issue submitted to the jury. It appears, however, that the judgment was entered against J. D. Manor, Blanch B. Manor, Shirley M. Sebrell and Margaret L. Haywood, parties trading as Harrisonburg Milling Company. This judgment, so far as it affects Margaret L. Haywood, is void because no process had ever been served upon her and the suit had abated as to her. This, however, is an error that can and should be corrected under section 3451 of the Code. *Goode* v. *Bryant*, 118 Va. 327, 87 S. E. 593. The judgment will, therefore, be amended so as to omit any recovery against Margaret L. Haywood.

After the jury had been discharged, the purchaser moved to set aside the verdict upon the ground of misconduct on the part of the jury, and filed an affidavit of one of the jurors to the effect that the jury made an agreement among themselves that each should set down the amount to which he considered the plaintiff entitled to a verdict, and the sum of these amounts should be divided by the number of jurors and the result thus secured should be the verdict to which all would assent and agree, and that this plan was carried out by the jury, and the verdict rendered in the case was arrived at by this plan. This is supported by an affidavit of M. L. Walton, Jr., to the effect that in looking over the papers in the action he observed the following figures written on the papers of the said suit: 7—8400

1200.

It has long been settled in Virginia that such affidavits are received with great caution, and only in exceptional

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cases and in order to prevent a failure of justice. The record discloses nothing which takes this case out of the established rule. *Koiner* v. *Rankin's Heirs,* 11 Gratt. (52 Va.) 431; *Bull's Case,* 14 Gratt. (55 Va.) 613; *Street* v. *Broaddus,* 96 Va. 823, 32 S. E. 466; *Johnson* v. *Davenport,* 3 J. J. Marsh (Ky.) 390.

The case presents difficulty, but the controversy has been submitted and determined in the method prescribed by law, and we find no reversible error in the proceedings.

Amended and Affirmed.

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Richmond.

MCCORMICK V. MCCORMICK.

November 14, 1918.

1. APPEAL AND ERROR—*Divorce—Affirmed.*—In a suit by a wife against her husband, praying a divorce on the grounds of cruelty, desertion and incurable impotency, and for suit money, counsel fees and alimony, the husband answered, denying all of the allegations of the bill, and alleging desertion by his wife, without sufficient cause, and prayed that his answer might be treated as a cross-bill, and that he be decreed a divorce *a mensa* from his wife on account of such desertion. The judge of the trial court refused the prayer of the bill of the wife for a divorce, but granted the prayer of the husband's cross-bill, and awarded him a divorce *a mensa et thoro* on the ground of desertion, which was subsequently enlarged and merged into a decree of divorce from the bond of matrimony. After a careful consideration of the record, the Supreme Court of Appeals was unable to discover any substantial error to the prejudice of the appellant in the decrees of the trial court.

Appeal from a decree of the Circuit Court of Rockbridge county. Decreed for defendant on his cross-bill. Complainant appeals.

The opinion states the case.

Affirmed.

Hugh A. White, C. C. Burkley, for the appellant.

Timberlake & Nelson, for the appellee.

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PER CURIAM.

The bill in this cause, with supplement and amendment, was filed by a wife against her husband, praying a divorce on the grounds of cruelty, desertion and incurable impotency, and for suit money, counsel fees and alimony. The husband answered, denying all of the allegations of the bill, and alleging desertion by his wife, without sufficient cause. He prayed that his answer might be treated as a cross-bill, and that he be decreed a divorce *a mensa* from his wife on account of such desertion. Suit money, counsel fees and temporary alimony at $25.00 per month was decreed to the wife. Depositions at great length were taken on both sides, and the testimony of the parties, under the permissive provision of the statute (Acts 1914, p. 154), was taken before the trial judge *ore tenus* in vacation. This testimony was taken down by a stenographer and is a part of the record before the court. There was also much documentary evidence composed chiefly of the correspondence between the parties. The judge of the trial court, in a carefully prepared written opinion, made a part of the record, refused the prayer of the bill of the wife for a divorce, but granted the prayer of the husband's cross-bill, and awarded him a divorce *a mense et thoro* on the ground of desertion, which was subsequently enlarged and merged into a decree of divorce from the bond of matrimony. The decree for the divorce *a mensa* also terminated the allowance of alimony at $25.00 per month. From these two decrees an appeal and supersedeas was allowed. Pending this appeal, the complainant has filed a petition asking for the payment of alimony at $25.00 per month from the date of the decree terminating its allowance to the present time, which decree was superseded by an order of this court, and for counsel fees in the prosecution of her appeal in this court.

The evidence on one of the main issues in the cause is

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not fit to print in an opinion of this court, but, after a careful consideration of the whole record, the court has been unable to discover any substantial error to the prejudice of the appellant in the decrees of the trial court, and they will therefore be affirmed.

The order of this court affirming the decree of the circuit court made February 19, 1917, terminating the monthly allowance of alimony, affirms it as of its date, and leaves it in effect as fully as if no appeal and supersedeas had been awarded, hence no alimony has accrued since that date.

For the prosecution of appellant's appeal in this court, the court is of opinion that $200.00 is a reasonable fee to be paid to her counsel and that the same should be paid by the appellee, and that there should be no other decree for costs in the cause.

Affirmed.

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Richmond.

RATCLIFFE V. MCDONALD'S ADMINISTRATOR.

November 14, 1918.

Absent, Prentis, J.

1. DEMURRER—*Notice of Motion.*—In the instant case, a motion for judgment to recover damages for the death of plaintiff's intestate, there was no motion to quash the notice of motion, but counsel for defendants merely stated in the grounds of defense that the notice "does not in law sufficiently state a case; hence subject to demurrer." To say that a pleading is subject to demurrer, even in a proceeding by motion, cannot be said to constitute a demurrer to such pleading.
2. PLEADING—*Married Women—Christian Name.*—In a proceeding by motion for judgment to recover damages for the negligent killing of plaintiff's intestate against a husband and wife, the wife should be impleaded by her own *baptismal*, or *Christian, name*, and not by the initial letters of her husband's name; the former is her legal designation.
3. DEATH BY WRONGFUL ACT—*Contributory Negligence—Parent and Child.*—In the instant case a proceeding by motion to recover damages for the negligent killing of plaintiff's intestate, a child about four years of age, there was evidence tending to show that the negligence of plaintiff proximately contributed to the accident, and under the statute of distributions the recovery would inure to his benefit.

   Held: That it is settled law in this jurisdiction that in such a case plaintiff could not recover.
4. INSTRUCTIONS—*Directing Verdict—Instructions Not Covering Whole Case.*—In a proceeding by motion against husband and wife to recover for the negligent death of plaintiff's intestate, an instruction concluded with the direction that the jury should find for the plaintiff against both defendants, if they believed from the evidence the facts upon which the instruction was predicated. The rule is that where an instruction so concludes it is bad unless it covers every phase of the case that is supported by evidence. The instruction in question ignored that rule, in that it left out of consideration the ques-

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tion of the contributory negligence of plaintiff as affecting his right to recover at all, and therefore should have been refused.

5. DEATH BY WRONGFUL ACT—*Measure of Damages.*—Code of 1904, section 2903, provides that "the jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars." No other restriction is placed upon the jury, and it was intended to leave the jury to fix the damages at such sum as the evidence in the particular case seemed to indicate was "fair and just," not exceeding $10,000, and an instruction given in language frequently approved by the Supreme Court of Appeals and intended simply as an aid to the jury in arriving at a verdict in accordance with the provision of the statute, is not erroneous.

6. DEATH BY WRONGFUL ACT—*Measure of Damages—Case at Bar.*—Accordingly, in the instant case, it was not error to instruct the jury that in ascertaining the damages that the plaintiff is entitled to recover, they should find the same with reference: "First: To the pecuniary loss sustained by the father and the mother of the deceased, and the (6) one brother and five sisters of the deceased, fixing such sum as would be equal to the probable earnings of the deceased child, taking into consideration his age, intelligence, and health, during what would have been his lifetime, if he had not been killed. Second: In ascertaining the probability of life of the deceased, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third: By adding thereto compensation for the loss of his care, attention and society to his father and mother, and his brothers and sisters. Fourth: By adding such further sum as they may deem fair and just by way of solace and comfort to his father and mother, and brothers and sisters, for the sorrow, suffering and mental anguish occasioned to them by his death."

7. APPEAL AND ERROR—*Instructions—Exception to Instructions.*—A general exception to all of a number of instructions, followed by specific objections to each, is a sufficient compliance with the statute; and to require a separate certificate, signed by the judge, to be appended to each instruction given or rejected, would introduce an inconvenient rule of practice not required by the statute, and needlessly incumber the record without any resultant benefit.

8. AUTOMOBILES—*Presumption that Pedestrian Will Use Ordinary Care—Children.*—The driver of an automobile may have a right to presume that a person of responsible age and ap-

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parently in possession of his faculties, will exercise ordinary care for his own protection, and will not negligently or recklessly expose himself to danger. But a driver has no right to indulge such presumption in the case of a child only four years of age.

Error to a judgment of the Circuit Court of Rockbridge county, in a proceeding by motion for judgment for damages. Judgment for plaintiff. Defendants assign error.

Reversed.

The opinion states the case.

O. B. Harvey, John Critcher and *O. C. Jackson,* for the plaintiff in error.

R. R. Ruff, J. H. May and *Charles Curry,* for the defendant in error.

WHITTLE, P., delivered the opinion of the court.

J. L. McDonald, administrator of his son, Ash Mankin McDonald, deceased, brought this notice against J. K. Ratcliffe and "Mrs. J. K. Ratcliffe" to recover $10,000 damages for the alleged negligent killing of plaintiff's intestate (a child about four years old) in driving their automobile against the person of intestate and crushing his body between the car and the steps to the store porch of the defendant, J. K. Ratcliffe, fronting on a public street in the town of Goshen.

The jury returned a verdict for the plaintiff against both defendants, upon which the court rendered the judgment under review.

The defendants reside at Goshen, where the husband is engaged in the mercantile business, in the store house where the accident happened. Since our decision must

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turn chiefly upon the action of the court in giving and refusing instructions, we only deem it necessary to state so much of the evidence as tends to elucidate the ruling of the court in that regard.

A few months previous to the accident, J. K. Ratcliffe purchased an automobile for the pleasure and entertainment of himself and family; and his wife having received some instruction in running the machine, was permitted by her husband to use it for her own diversion whenever she desired to do so. J. K. Ratcliffe was in the habit of having the car washed and cleaned by a negro man named Sandy Thomas, who the evidence tended to show was not in his employment but who testified that he rendered this service without charge in order to get a ride now and then. On the day in question he was standing in front of the store near the automobile, when Mrs. Ratcliffe, together with several members of the family, entered it for a drive. Mr. Ratcliffe came out of his store on the porch, and Thomas testified he thinks told him to get on the front seat with his wife, who was at the wheel, and turn the car around for her at the furnace. Shortly afterwards plaintiff, accompanied by three of his children, went to the store to make some purchases. They had left the store and descended the steps of the porch into the street for the purpose of crossing over diagonally to where his wagon and team were standing, the children being "strung out in front of the porch steps," when Mrs. Ratcliffe approached from the rearward in the car. McDonald says he saw the car coming and called the attention of the children to it. The evidence is conflicting in details as to how the accident occurred; but, so it was, the little boy was struck and crushed to death in the manner described.

The assignments of error which claim our consideration are as follows:

1. The first assignment is to the sufficiency of the notice

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of motion for judgment. There was no motion to quash the notice, and no demurrer thereto. Counsel for defendants merely states in the grounds of defense that the notice "does not in law sufficiently state a case; hence subject to demurrer."

To say that a pleading is subject to demurrer, even in a proceeding by motion, cannot be said to constitute a demurrer to such pleading. As, however, the judgment has to be reversed on other grounds and remanded for a new trial, we deem it proper to say, that the defendant, Mrs. Ratcliffe, should be impleaded by her own *baptismal,* or *Christian, name,* and not by the initial letters of her husband's name; the former is her legal designation.

2. The second assignment is to the giving of instructions Nos. 1, 2 and 4, at the request of plaintiff.

Instruction No. 1 is as follows: "The court instructs the jury that if they believe from the evidence in this case that the intestate was an infant child under the age of four years when he was killed by the Ratcliffe's car, then the court tells the jury the said child as a matter of law was not capable of being guilty of any negligence that so contributed to his death as to defeat the plaintiff's right to recover in this case. Nor can any negligence of the father, if there was any such negligence in causing the death of the child, be considered by the jury to defeat the plaintiff's right to recover."

There was evidence tending to show that the negligence of plaintiff, J. L. McDonald, proximately contributed to the accident, and under the statute of distributions the recovery would inure to his benefit. In such case it is settled law in this jurisdiction that he cannot recover.

The case of *R. F. & P. R. Co.* v. *Martin's Adm'r,* 102 Va. 201, 45 S. E. 894, is similar in pleading and evidence to the hypothetical case presented by the instruction, and is directly in point. It was there held: "In an action for

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the benefit of a father, to recover damages for the death of his infant child occasioned by the wrongful act of another, there can be no recovery where it appears that the negligence of the father, or of the custodian of the infant to whom the father entrusted it, proximately contributed to the result." The same principle is enunciated in *Reid* v. *Medley's Adm'r*, 118 Va. 462, 87 S. E. 616.

In this case the verdict of the jury is general and did not specify to whom the recovery should be paid; and, therefore, as observed, by the Virginia statute of distributions, the recovery goes to the father. Code, sec. 2904. Hence, the court erred in giving instruction No. 1.

Instruction No. 2 is as follows: "The court instructs the jury that if they believe from the evidence in this case that the defendant, Mr. Ratcliffe, owned the car which did the mischief; that the negro chauffeur, Sandy Thomas, was in the car with the defendant, Mrs. Ratcliffe, and by her side to assist her at the instance of Mr. Ratcliffe at the time the mischief happened; that the negro chauffeur by the exercise of ordinary care on his part could have avoided the mischief, either by the use of the steering wheel or the emergency brake of the car, and that he negligently failed to exercise such ordinary care, and if they believe that Mrs. Ratcliffe negligently ran the car against the intestate and killed him, then the jury must find a verdict against both of the defendants."

This instruction concludes with the direction that the jury shall find for the plaintiff against both defendants, if they believe from the evidence the facts upon which the instruction is predicated. The rule is that where an instruction so concludes it is bad unless it covers every phase of the case that is supported by evidence. The above instruction ignores that rule, in that it leaves out of consideration the question of the contributory negligence of plaintiff as affecting his right to recover at all. For these reasons, instruction No. 2 should have been refused.

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Instruction No. 4 reads: "The jury are instructed that if they find for the plaintiff, in ascertaining the damages that the plaintiff is entitled to recover, they shall find the same with reference:

"First—to the pecuniary loss sustained by the father and the mother of the deceased, and the (6) one brother and five sisters of the deceased, fixing such sum as would be equal to the probable earnings of the deceased child, taking into consideration his age, intelligence, and health, during what would have been his life time, if he had not been killed.

"Second—In ascertaining the probability of life of the deceased, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life.

"Third—By adding thereto compensation for the loss of his care, attention and society to his father and mother, and his brothers and sisters.

"Fourth—By adding such further sum as they may deem fair and just by way of solace and comfort to his father and mother, and brothers and sisters, for the sorrow, suffering and mental anguish occasioned to them by his death."

The statute provides that "the jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars." No other restriction is placed upon the jury, and it was intended to leave the jury to fix the damages at such sum as the evidence in the particular case seemed to indicate was "fair and just," not exceeding $10,000, and the instruction given is in language which has been frequently approved by this court, and is intended simply as an aid to the jury in arriving at a verdict in accordance with the provision of the statute. We have no disposition to depart from our former rulings on the subject. *Pocahontas Collieries Co.* v. *Rukas' Adm'r*, 104 Va. 278, 51 S. E. 449; *Portsmouth R. Co.* v. *Peed's*

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Adm'r, 102 Va. 662, 47 S. E. 850; *Norfolk & W. R. Co.* v. *Cheatwood's Adm'x*, 103 Va. 356, 49 S. E. 489.

But it is insisted that this assignment of error cannot be availed of at all, because the exception was to the instructions *as a whole*. A general exception to all of a number of instructions, followed by specific objections to each, is a sufficient compliance with the statute; and to require a separate certificate, signed by the judge, to be appended to each instruction given or rejected, would introduce an inconvenient rule of practice not required by the statute, and needlessly incumber the record without any resultant benefit.

3. The third assignment is to the refusal of the court to give defendant's instructions Nos. 10 and 11.

Instruction No. 10 is as follows: "The court instructs the jury that an automobile is not considered a dangerous instrumentality, requiring more than ordinary care, under the circumstances, in its operation and use; that while using ordinary care and complying with the statutes the driver of an automobile has a right to use the public highways; and that he has the right to presume that every person whom he meets on the highway will exercise ordinary care and caution, according to the circumstances, and will not negligently or recklessly expose himself to danger."

The court did not err in rejecting this instruction. Taken as a whole it is misleading and inapplicable to the facts of this case. The driver of an automobile may have a right to presume that a person of responsible age, and apparently in possession of his faculties, will exercise ordinary care for his own protection, and will not negligently or recklessly expose himself to danger. But a driver has no right to indulge such presumption in the case of a child only four years of age.

Instruction No. 11, refused by the court, reads: "The court instructs the jury that if they believe from the evi-

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dence that the father of the intestate was present at the time of the injury; that he failed to exercise ordinary care for the protection of the intestate; and that said parent's negligence in this respect contributed to the injury, then there can be no recovery, although they may believe the defendants also negligent."

What has already been said in connection with the action of the court in giving instruction No. 1, at the request of plaintiff, shows that it erred in refusing to grant instruction No. 11.

Our conclusions upon the foregoing assignments of error, and the reasons given, show that the verdict of the jury must be set aside and the judgment reversed, and the case remanded for a new trial to be had therein not in conflict with the views expressed in this opinion.

Most of the other assignments of error relate to incidents of minor importance that transpired during the trial and which are not likely to recur at another trial, and, therefore, need not be discussed. It is due, however, to the honorable judge who presided at the trial of the case below to say, that the suggestion that he indulged in derogatory remarks to Mrs. Ratcliffe while testifying in her own behalf is a misconception of that occurrence. She was a nervous, hysterical witness, and the evident purpose of his honor was to quiet her agitation and enable her to testify calmly and coherently.

The fact that a new trial must be had on other grounds renders it unnecessary, if indeed it would be proper, to pass upon the remaining assignment of error, that the verdict is contrary to the law and the evidence.

Reversed.

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CRIMINAL CASES.

Wytheville.

ARTRIP V. COMMONWEALTH.

June 19, 1918.

1 CRIMINAL LAW—*Sufficiency of Evidence to Convict—Proof Beyond Reasonable Doubt.*—In order to justify a conviction in a criminal case, every fact necessary to a conviction must be proved beyond a reasonable doubt. The result of the evidence must not only be consistent with the guilt of the accused, but must exclude every reasonable hypothesis of his innocence.

2. INTOXICATING LIQUORS—*Evidence Held Not Sufficient to Support a Conviction.*—In the case at bar, the only witness for the Commonwealth testified that in a conversation with the accused, he told accused that he was sick with rheumatism and asked if accused knew where the witness could get any liquor. Accused said he did not have any, and did not know where any could be obtained. Witness then asked accused, if he could find any, to get a quart for him and put it away. Accused said that he would do his best for witness, and that witness should look about accused's coal house for it. Two or three days afterwards, witness went to accused's store, got a bucket from accused and went down to a branch to get water. On returning from the branch witness found a bottle of whiskey between two logs fifteen or twenty feet from the coal house. Witness took the bottle and left $1.50 where he found it. Witness did not speak to accused about liquor that day, and accused did not know that he was coming that day. Accused placed two disinterested witnesses on the stand, who testified that they saw another than the accused hide the whiskey at the place where it was found. Accused denied that he knew anything about the whiskey or got the $1.50.

Held: That the testimony was plainly insufficient to sustain a verdict of guilty.

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Error to a judgment of the Circuit Court of Russell county.

Reversed.

The opinion states the case.

Finney & Wilson, for the plaintiff in error.

John R. Saunders, Attorney-General, and *J. D. Hank, Jr., Assistant Attorney-General,* for the Commonwealth.

BURKS, J., delivered the opinion of the court.

The plaintiff in error was convicted of violating the prohibition law (Acts, 1916, p. 215) on an indictment charging that he "did unlawfully manufacture, sell, offer, keep, store and expose for sale, give away, dispense, solicit, advertise, receive orders for and aid in procuring ardent spirits against the peace and dignity of the Commonwealth."

The only error assigned is that the verdict is not supported by the evidence.

The Commonwealth introduced only one witness, William Finney, who testified as follows: "Last winter, at Cleveland, Virginia, M. P. Artrip and myself were talking at or near a car loaded with coal on the yard at Cleveland; I told him that I was sick, that my rheumatism was hurting me very badly and asked him if he knew where I could get any liquor or find any whiskey. He said he did not have any, did not know where any was, and that it was mighty hard to get. We talked on and I told him if he could find any over there to get me a quart and put it away for me, and he said he would do his best and if he could find any for me to come over and to look about the coal house and I might find it. Soon afterwards, or in two or three days, I went over to Clinchfield, where Artrip had a store,

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after a load of passengers. I run an automobile for hire. I went in the store and there were several people in his store, between eight and fifteen, and asked him for a bucket to get some water to put in my car. He showed me a bucket on the opposite side of the store from where he was, and I got the bucket and went down to the branch some forty feet from the front store door. As I went after the water I passed by Artrip's coal house and looked in the coal house for the whiskey that we had talked about and found none; went on to the branch, got my bucket of water, and as I returned coming up a bank from the branch there were two logs lying side by side fifteen or twenty feet from the coal house and they were above me and I could see up under them as I came up the bank. I discovered under these logs a quart bottle full of whiskey. I went around and pulled the bottle out from between the logs, put it in my pocket, left $1.50 in cash where I found the bottle, put the water in my car, took the bucket back and set it down on the store porch and got in my car and left. I did not speak to M. P. Artrip about liquor that day, he did not know I was coming that day, and the only conversation I had with him on that day was about the bucket to get the water. I never had any conversation with any one else about the liquor or about getting liquor at that place."

This testimony was wholly insufficient to sustain the charges of the indictment, and the accused might have safely rested here, but, in order to vindicate himself, he placed two disinterested witnesses on the stand, and also testified himself. One of these witnesses, William Breeding, testified as follows: "On the day William Finney was supposed to get the liquor in question, I came to Clinchfield and was at the post office, and I met Bert Luttrell there and we came on down Hurricane to the store of M. P. Artrip; Bert Luttrell had a quart of liquor in his under pants pocket and had on overalls. When we got near M. P. Artrip's store

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we walked around behind the coal house, or an old house, for Bert Luttrell to hide this quart of liquor, as it showed plainly through his clothing. He hid it by an old building, or under some logs, and the coal house was between it and M. P. Artrip's store. Bert Luttrell was working that day in the shaft mines and I saw him hide this quart of liquor between said logs. Bert Luttrell is dead; died since." The other, Ross Bumgardner, testified to substantially the same facts.

The accused testified as follows: "I am the defendant in this case. I did not put the liquor between said logs below the coal house that Will Finney found; I did not know said liquor or whiskey was there, and I did not get the $1.50 that Will Finney stated he left at the place where he found the liquor. Will Finney came to my store that evening in his jitney car and came in and asked me for a bucket to get water to put in his car and I gave him the bucket; he took the bucket and went out and afterwards returned the bucket. Finney stayed at my store only a short while, and said he came to the store for some passengers, he being a carrier of passengers in an automobile. The only conversation I had with Finney while in the store was about the bucket, and I knew nothing at all about Finney's finding the whiskey or leaving the money."

No comment upon the testimony is necessary. It is plainly insufficient to sustain the verdict of the jury. In order to justify a conviction in a criminal case, every fact necessary to a conviction must be proved beyond a reasonable doubt. The result of the evidence must not only be consistent with the guilt of the accused but must exclude every reasonable hypothesis of his innocence. *Burton & Conquest* v. *Commonwealth,* 108 Va. 892, 62 S. E. 376.

The judgment of the Circuit Court of Russell county must, therefore, be reversed, the verdict set aside, and the cause remanded for a new trial.

Reversed.

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Wytheville.

CANTER V. COMMONWEALTH.

June 19, 1918.

1. CRIMINAL LAW—*Presumption of Innocence.*—One charged with crime is presumed to be innocent, and that presumption follows him throughout every stage of the trial.
2. CRIMINAL LAW—*Presumptions and Burden of Proof—Reasonable Doubt.*—The burden of showing the guilt of the prisoner to the exclusion of every reasonable doubt is upon the Commonwealth, and this burden never shifts and always rests upon the prosecution. While the Commonwealth may prove such facts as may raise the presumption of guilt unless they are rebutted by the accused, still after the evidence is closed, if upon a consideration of the whole there is a reasonable doubt of his guilt, the jury should acquit.
3. HOMICIDE—*Evidence Necessary to Sustain Conviction—Reasonable Doubt—Case at Bar.*—The facts adduced by the prosecution to convict the accused, considered collectively as they must be when circumstantial evidence is relied on, are just as consistent with his innocence as with his guilt, and when this is true, that interpretation which acquits him must be adopted, for it is fundamental that if there be a reasonable doubt of his guilt there can be no conviction. After six trials the Commonwealth has failed to produce evidence sufficient to sustain a conviction. Suspicion cannot be substituted for proof, and upon this evidence the accused is entitled to an acquittal.

Error to a judgment of the Circuit Court of Washington county.

Reversed.

The opinion states the case.

N. P. Oglesby, for the plaintiff in error.

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No appearance for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

This case is before this court for the second time. *Canter* v. *Commonwealth*, 118 Va. 800, 88 S. E. 327.

Upon the previous record the Attorney-General and the assistant Attorney-General confessed error in this court, and the judgment condemning the accused to death for the murder of Maude Wilson was reversed. At that time it was said: "We have carefully examined the evidence and concur in the view expressed by the Attorney-General and his assistant, that it is inadequate to connect the prisoner with the crime with that degree of certainty required by the criminal law of this Commonwealth."

While there are some substantial variations in the evidence in the record now to be considered from the previous record, still the incriminating circumstances relied upon by the Commonwealth are in substance identical and the variations in the testimony are not sufficient to justify a different conclusion. Since the case was here, the prisoner has been tried five times, and four carefully selected juries have failed to agree upon a verdict and were, therefore, discharged. Upon his sixth trial he was found guilty of murder in the first degree and sentenced to confinement in the penitentiary for life. That judgment is before us for review upon the prisoner's motion to set aside the verdict and grant him a new trial, upon the ground that the evidence is insufficient to sustain the conviction.

Mrs. Wilson was murdered under circumstances which naturally inflamed the public mind and which justly aroused the indignation of all. Her husband and her brother left home about two o'clock in the afternoon on Friday, the 23rd day of April, 1915, to go to her father's place, some twelve or thirteen miles away, for the purpose

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of assisting him in his farm work, to remain absent until Sunday, the 25th. Before leaving home the husband had his wife promise also to leave the house not later than five o'clock in the afternoon for the purpose of spending the night at the home of a near neighbor; and this because it was regarded as unsafe for her to remain alone at home. Upon Saturday afternoon, the 24th, between five and six o'clock, Wilson's father and a friend came to Wilson's house for supper. Finding that nobody responded to their greetings, and then finding a door open, they went into one of the rooms of the house and found Mrs. Wilson dead upon the floor. She had been gagged with a red bandana handkerchief, her union suit and some other parts of her clothing tied around her head and face, and her arms were tied to the bed post. She was almost nude. She had been mortally shot in the left side, apparently while prone upon the floor, and their conclusion was that she had been ravished. At the inquest on Sunday, the accused, James Canter, was arrested and charged with the crime. He protested his innocence, and on the same day his brother, Luther Canter, who had been a fugitive from justice for several months charged with rape, confessed, first to his mother and then to Mr. S. P. Legard, who was supervisor of the district, in the presence of his brother, W. J. Legard, that he, Luther, was the murderer and ravisher of Mrs. Wilson, and that his brother James knew nothing about it and had nothing to do with it. Upon this confession Luther Canter was convicted and has been electrocuted therefor.

The main facts relied upon to convict James Canter of the crime are:

(1) That he had no two occasions, in lewd conversation, indicated his lecherous disposition and lustful desires towards Mrs. Wilson—once to a woman with whom he was drinking out of a bottle along the road, and again with his

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boyish companions. The statement was made to the woman nine months before the murder, and her evidence, as shown in the two records before this court, varied to this extent: In the first record it is, "I wish I could have Mrs. Wilson; I would rather see her dead than living with Ruf. Wilson." Upon the last trial it was, "He said that he loved Mrs. Wilson and had tried to get her to go away with him, and she would not go, and he would kill her before she would (should) stay with Mr. Wilson, but he was drinking." Another witness, Mary Foust Worley, testified that a short while before the murder he had said, "that Mr. Wilson was mad at him, and that his wife was not, and that he had not quit speaking to Mr. Wilson, and he said that he loved Mrs. Wilson, many times, but I thought he was just joking. I never thought anything about any trouble. I seen Jim and her in the berry field one time when we went in there, but I seen no harm between them. He always said she was nice."

The accused had worked as a farm hand with Mr. Wilson for nearly a year, and during that time was intimate and friendly with the family—so intimate that Mrs. Wilson frequently read good books to him, and he stayed at the house one night with Mrs. Wilson's small brother, evidently as her protector. This friendly relationship, however, had been severed about two months before the murder, and the accused, Canter, had been discharged by Wilson for inefficiency, chiefly because he wanted to quit work too early in the afternoon.

(2) That a red bandana handkerchief, apparently identical with that with which Mrs. Wilson was gagged by her murderer, was found in the pocket of some overalls which belonged to the prisoner. There were no peculiar marks about either of these handkerchiefs and no one testified that he ever bought two such handkerchiefs. The prisoner himself stated that he had bought several handkerchiefs.

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red and white, from Hilton, a merchant in the neighborhood, but that he had only bought two red handkerchiefs from him, and one of them was found in his own pocket, which he said had been torn to bind up his bleeding finger, and the other was the one found in his overalls pocket. All that Hilton could say about it was, that the handkerchief with which Mrs. Wilson was gagged and that found in the overalls pocket were similar in pattern to handkerchiefs which had been sold at his store, and that he had only one kind of red bandana handkerchiefs for sale.

(3) The overalls to which James Canter directed the officers were hanging up in his room at his home, and upon the back part of one leg blood stains were found. These blood stains were analyzed by an expert and he expressed the opinion that the blood on the overalls was either human blood or the blood of some animal having similar blood. The prisoner did not undertake to account for these blood stains, but said he did not know from what source they came. Upon repeated examinations from time to time in response to questions, he suggested that they might have come from a bleeding finger; that he had helped Mr. Wilson to kill hogs once; that his nose sometimes would bleed and that he might have gotten his hands in it; and that he sometimes wrung the necks of chickens for his mother. He declined, however, to state or undertake to state the source of this blood.

(4) Cuddy, deputy sheriff, testified that when the accused was brought to jail and placed in an upper cell, from which he could see Luther Canter when he was later brought there and put in a lower cell, he (Cuddy) heard them talking in loud tones to each other, one being upstairs and one downstairs, and that Jim said to Luther, "You didn't give up," and Luther said, "I did;" and Jim said, "You didn't confess, did you," and Luther said, "I did;" then Jim said, "You didn't say anything about the trouble

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down there," and Luther said, "I did," and then Jim said, "You've played hell;" that he (Cuddy) did not know what they were talking about. When it is remembered that Luther Canter had been evading arrest for another crime for many months, it is at least equally probable that the inquiries of the accused referred to that other crime as to Mrs. Wilson's murder. That James Canter should in a loud conversation, under these circumstances, implicate himself is inconsistent with anything he ever said or did at any other time or place.

It also appears that on the day before the crime was committed Luther Canter was in hiding near the Canter house; that he came out to the place in the Legard "newground" where his father and others were working; that the accused brought dinner to them. It is also shown that when Wilson and his wife's brother left home on Friday afternoon they could have been plainly seen by persons at the Canter house and the "newground" for a considerable distance as they traveled along the road on their journey.

On the other hand, the facts relied upon to show his innocence are these:

It was proved by the Commonwealth's witnesses as well as by the prisoner's witnesses, that James Canter was in the city of Bristol in the early afternoon of Friday, March 23rd; that in company with certain boys, apparently of his own age, he rode on a freight train from Bristol, about three or three and a half miles, towards his own home, and jumped from the train there at about four or half past four o'clock; that he went across the field, not in the direction of the Wilson house but towards his own home. It sufficiently appears that when nearly home he caught up with his mother, carrying a bucket of water, and that a few minutes thereafter he went out to the Legard "newground," in a different direction from the Wilson house, where his father and several others were at work; that he

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stayed with them until they quit work, at about 5:30 o'clock, and then went to his home nearby to supper.

It is manifest that Mrs. Wilson was attacked and either imprisoned or killed at her home at some time between two o'clock, when her husband left, and six o'clock that afternoon. This is clear for the Commonwealth's testimony shows that Mrs. Wilson promised her husband not to remain at home later than five o'clock; so that during the period in which Mrs. Wilson must have been attacked, the prisoner's movements are fully accounted for—during most of the time by the Commonwealth's witnesses, and during the entire time by unimpeached and disinterested witnesses.

Again, it is clearly proved that during this afternoon as well as on the next day the prisoner was wearing a pair of brown corduroy pants, and no witness is produced who testifies that James Canter had on the overalls at any time during the period from Friday, the 23rd, to the inquest, Sunday, the 25th.

The theory of the prisoner's counsel is that Mrs. Wilson was shot about four o'clock on Friday afternoon, and he introduced two witnesses, Carmack, who was working in a field nearby, and Moore, who was hauling extract wood to the Legard siding, who testified that they heard what they thought to be a gun shot, in the direction of the Wilson house at about that hour. Others in the vicinity testified that they did not hear such shot. The theory of the Commonwealth, however, is that Mrs. Wilson was not murdered in the afternoon, but was kept helpless and bound until about 4:20 A. M., Saturday, the 24th. To sustain this theory they introduced the witnesses, Hensley and his wife, who testified that they were milking their cows at that hour and heard in the direction of the Wilson house what they thought was a gun shot. Wilson had a gun in the room in which the murder was committed, and the empty cartridge from this gun was found in the room, and the gun itself

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was found on Sunday, concealed, covered with leaves, by the side of a fence in a hollow between the Wilson and the Canter house, but not in sight of the Canter house, and it appears that the shot which killed Mrs. Wilson was fired from this gun.

After the confession of Luther Canter, and because his captor, Legard, disbelieved it, he was asked where he had concealed the gun, and when he went towards the place where it was found, having until just before that time, so far as the testimony shows, been in hiding and not at the Canter house, Mr. Legard was satisfied, and as he expresses it had no doubt of his (Luther's) guilt.

This appears to be all of the pertinent testimony in the case. Several physicians testified that they thought, but were by no means certain, that the woman was not shot as early as four o'clock on Friday. The wound in the body showed the powder marks, and from this the witnesses properly inferred that the gun was held close to the body at the time it was fired, and taking the position of the body as they found it and the course of the shot, they were certain that the person who fired the gun stood at the time very close, probably within one foot of the body, and from this it was inferred that the blood spouted out upon the overalls. That this is an inference from facts which are not known is perfectly apparent, because it is not known in what position the body was at the time the shot was fired. Luther Canter, the only person who claimed to know, said, however, that he stood about eight feet away. There is much testimony tending to discredit Luther Canter's statement that he committed the crime alone, based upon the fact that he was a frail, weak man, while Mrs. Wilson was twenty years of age, a stout, strong, robust woman.

In order to connect James Canter with the murder, in accordance with the theory of the Commonwealth, we must assume that at some time after eating his supper on the

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evening of Friday, the 23rd, and after he had gone to bed (according to the testimony of those in the house) he got up in the night, put on his overalls and went down to the Wilson house and there murdered or assisted in the murder of Mrs. Wilson, when there is no sufficient evidence to support such a theory. That it was possible is no doubt true, but men should not be convicted of crime merely because they are suspected of it and there is a possibility of guilt. In this case the jury were properly instructed, that unless the circumstances proved are of such a character and tendency as to produce upon a fair and unprejudiced mind a moral conviction or conclusion of the guilt of the accused, it was their duty to acquit; and that in order to convict a person upon circumstantial evidence, it is essential that the circumstances should to a moral certainty exclude every reasonable hypothesis except that of guilt. It is a mere suspicion that the handkerchief with which Mrs. Wilson was gagged was ever in the possession of James Canter. It is a certainty from the evidence that at the time Mrs. Wilson was attacked in the afternoon of Friday, the 23rd, James Canter did not have on the overalls; and it is a certainty from this evidence that from the early afternoon until six o'clock, during which the assault must have been first made, James Canter was not at the Wilson house at any time, and his alibi from six o'clock on Friday night until seven o'clock on Saturday morning, is proved by the members of his family, who, however, are said by many witnesses to be unworthy of belief. His action on Saturday, the 24th, is not that of a guilty man, for early on that morning he left his home on foot, going the usual way to Bristol in the direction of the Wilson house, and unless he abruptly left the road or path he passed immediately by the Wilson house to the public road. That he would have gone so near the scene of his crime, if guilty, seems incredible. He spent Saturday and Saturday night at his sister's

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in Bristol, and having heard, along with the rest of the community, of the tragedy, on Sunday morning he went, in company with others, to the Wilson house. He has made no incredible or contradictory statements upon any material point.

It is noteworthy that the Commonwealth undertook to destroy the alibi of the prisoner on Friday night, during which he says he stayed at home all night long, by the testimony of the witnesses, Campbell and Logan, who on Sunday morning were coming with him down to the Wilson house where the crowds were gathering; and they say that he then told them that on Friday night, as he came from town, he was attacked by two men on the railroad track. The prisoner denied this, and said that he told them he had been attacked some time before by men at that place. The prisoner is strikingly corroborated as to this occurrence by Rufus Wilson, the husband of the deceased, who testified for the Commonwealth that two or three months before he discharged him, Canter came in his house one evening and told the same story, and showed scratches on his face and a torn place in his coat. The Commonwealth also attaches significance to the testimony of these witnesses as to the prisoner's conversation during the same walk to the Wilson house, especially what he said about the gun and how the crime was committed; but it must be remembered that he was perfectly familiar with the interior of the Wilson home, and as to the other matters discussed his knowledge was no greater than the public knowledge. At that time, it appears from the record, everybody was talking about the murder and its details, which had been discovered on the evening before, and they were all on their way to attend the inquest.

This was said in *Burton & Conquest* v. *Commonwealth*, 108 Va. 898: "In order to justify a conviction, juries are told that every fact necessary to a verdict of guilty must

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be proved beyond a reasonable doubt; and that, if there be a reasonable doubt as to any fact, they shall acquit; that the result of the evidence must be to exclude every reasonable hypothesis of innocence and be consistent only with the guilt of the accused. Now it is true that after the jury have rendered their verdict and a court is called upon to set it aside as being contrary to the evidence, the motion is heard, under our statute, as upon a demurrer to evidence, and it becomes the duty of the court to consider whether or not the evidence is sufficient to sustain the verdict. But the rule does not leave the jury at liberty to guess, and where a fact is equally susceptible of two interpretations, one of which is consistent with the innocence of the accused, they cannot arbitrarily adopt that interpretation which incriminates him." *Grayson's Case*, 6 Gratt. (47 Va.) 712; *Grayson's Case*, 7 Gratt. (48 Va.) 613; *Prior's Case*, 27 Gratt. (68 Va.) 1009; 8 R. C. L., sec. 222; note, 97 Am. St. Rep. 778.

One charged with crime is presumed to be innocent, and that presumption follows him throughout every stage of the trial. The burden of showing the guilt of the prisoner to the exclusion of every reasonable doubt is upon the Commonwealth, and this burden never shifts and always rests upon the prosecution. While the Commonwealth may prove such facts as may raise the presumption of guilt unless they are rebutted by the accused, still after the evidence is closed. if upon a consideration of the whole there is a reasonable doubt of his guilt, the jury should acquit. *Potts* v. *Commonwealth*, 113 Va. 733; *State* v. *Wingo*, 66 Mo. 181, 27 Am. Rep. 329.

In this case the facts adduced by the prosecution to convict the accused, considered collectively as they must be when circumstantial evidence is relied on, are just as consistent with his innocence as with his guilt, and when this is true, that interpretation which acquits him must be

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adopted, for it is fundamental that if there be a reasonable doubt of his guilt there can be no conviction. After six trials the Commonwealth has failed to produce evidence sufficient to sustain a conviction. Suspicion cannot be substituted for proof, and upon this evidence the accused is entitled to an acquittal.

The evidence being insufficient to warrant the verdict of guilty, the judgment of the trial court refusing to set it aside must be reversed, and the case remanded, to be disposed of according to law.

Reversed.

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Syllabus.

Wytheville.

PETTUS v. COMMONWEALTH.

June 19, 1918.

1. INTOXICATING LIQUORS—*Indictment—Demurrer.*—An indictment under the prohibition act, in the form authorized by the statute, is not demurrable.
2. APPEAL AND ERROR—*Harmless Error—Instruction Favorable to Plaintiff in Error.*—In a prosecution under the prohibition act, the court instructed the jury that it was unlawful for the defendant to keep or store for sale, gift or use, ardent spirits in any other place than in the *bona fide* home of himself. This was a mere inadvertence, for it is clearly unlawful to store ardent spirits for sale, even in a *bona fide* home; but inasmuch as the error is favorable to the plaintiff in error and not against his interest, it is harmless.
3. WORDS AND PHRASES—*Curtilage.*—The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment: the yard, garden or field which is near to and used in connection with the dwelling.
4. INTOXICATING LIQUORS—*Curtilage.*—Accused owned a city lot, fronting on two streets. On one front there were two store buildings six or seven feet apart, with an alley-way between them and connected by a hallway. In one of these buildings accused conducted the business of selling soft drinks, and in the other a grocery. Accused was unmarried and without family, and had a room over the store in which he sold soft drinks. There was a staircase leading from the room in which he slept down into the soft drink establishment, and there was an entrance from his sleeping room across the hall into the storage room over the grocery store from which a stairway led down into the grocery store. On the other street front there was another building, the lower floor being a vacant store, and the upper occupied by a tenant and his family. The rear of this building was about one hundred feet from the rear of the double store on the other street. Accused stored liquor in the grocery store and under the floor of the vacant store.

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Held: That the two store rooms in which the liquor was stored were not within the curtilage of the *bona fide* home of the accused.

Error to a judgment of the Corporation Court of the city of Roanoke.

Affirmed.

The opinion states the case.

A. B. Hunt, for the plaintiff in error.

John R. Saunders, Attorney-General, and *J. D. Hank, Jr. Assistant Attorney-General,* for the Commonwealth.

PRENTIS, J., delivered the opinion of the court.

The facts of this case are, that the accused owned a lot in Roanoke city, one end of which fronted on Ninth avenue, and the other on Gainsboro avenue. On the Ninth avenue front there were two store buildings six or seven feet apart, with an alleyway between them and connected by a hallway. In one of these buildings he conducted the business of selling soft drinks, and in the other a grocery. He was unmarried, without family, and had a room over the store in which he sold soft drinks. There was a staircase leading from the room in which he slept down into the soft drink establishment, and there was an entrance from his sleeping room across the hall into the storage room over the grocery store from which a stairway led down into the grocery store. On the Gainsboro avenue front there was another building, the lower floor being a vacant store, and the upper occupied by a tenant and his family. The rear of this building was about one hundred feet from the rear of the double store on Ninth avenue.

On the 20th of December, 1916, the police searched these premises. In the grocery store, concealed under one of

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the front windows, they found fifteen pints of whiskey, thirteen quarts of rum, one gallon of wine, one gallon of whiskey and one gallon of cider. It was all stored under the show windows in the front of the building and planked up. Half a pint of whiskey was found in the room in which he slept. After this discovery the accused admitted that he had 332 pint bottles of beer concealed under the floor of the vacant store on Gainsboro avenue, and it was found there.

The accused was the only witness who testified in his defense. He admitted all of the facts above stated, but denied that he had sold any ardent spirits, and said that he had purchased all of it for his personal use before the 1st of November, 1916, when the prohibition law became effective.

He demurred to the indictment and to each of the two counts thereof. As the indictment is in the form authorized by the statute, the demurrer was properly overruled. *Pine & Scott* v. *Commonwealth,* 121 Va. 812, 93 S. E. 652.

The court instructed the jury that it was unlawful for the defendant to keep or store for sale, gift or use, ardent spirits in any other place than in the *bona fide* home of himself. Of course, this was a mere inadvertence, for it is clearly unlawful to store ardent spirits for sale, even in a *bona fide* home; but inasmuch as the error is favorable to the defendant and not against his interest, it is harmless, and therefore there is no merit in this assignment of error. It is hardly probable that the jury could have been misled by that instruction. *Miller & Meyers* v. *Newport News,* 101 Va. 438, 44 S. E. 712; *Va. Ry. & Power Co.* v. *Hill,* 120 Va. 397, 91 S. E. 194; *Lucchesi* v. *Commonwealth,* 122 Va. 872, 94 S. E. 925.

The other alleged error relied upon by the accused grows out of the fact that he claims that both the grocery store fronting on Ninth avenue and the store room fronting on

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Gainsboro avenue constituted parts of his *bona fide* residence, and this contention is presented by exceptions to certain instructions given at the instance of the Commonwealth, and by instructions offered by him but refused by the court. In support of his contention he cites the case of *Bare* v. *Commonwealth,* 122 Va. 783, 94 S. E. 168, claiming that the places in which the liquor was stored were within the curtilage. There is no merit in this contention. The grocery store was no part of the home, nor was the storehouse fronting on Gainsboro avenue. Both were built for and devoted to entirely different uses.

In *Bare* v. *Commonwealth, supra,* this is said: "The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden or field which is near to and used in connection with the dwelling. 3 Cyc. 988; *Washington* v. *State,* 82 Ala. 31, 2 So. 356; *Cook* v. *State,* 83 Ala. 62, 13 So. 849; 3 Am. St. Rep. 688; *State* v. *Shaw,* 31 Me. 523; *Commonwealth* v. *Barney,* 64 Mass. (10 Cush.) 480; *Unseld* v. *Commonwealth,* 140 Ky. 529, 131 S. W. 263, 140 Am. St. Rep. 393."

The contention that the two store rooms in which the ardent spirits were stored were within the curtilage of the *bona fide* home of the accused is clearly untenable.

The accused was found guilty under both counts of the indictment, and his conviction is supported by the evidence.

Affirmed.

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Staunton.

CARTER v. COMMONWEALTH.

September 19, 1918.

1. APPEAL AND ERROR—*Harmless Error—Intoxicating Liquors—Carrying Liquor on Person or in Baggage.*—In the case at bar defendant objected that an instruction by the court below improperly and unlawfully distinguished between the right of a person to carry whiskey in his baggage and his right to carry it in his pocket.

   Held: That in the instant case the distinction was immaterial, because the defendant had in his possession more than the law allowed, even if it be conceded that having it in his pockets was equivalent to having it in his baggage.

2. INTOXICATING LIQUORS—*Transportation.*—Where defendant was arrested in a town hall with more than a quart of whiskey on his person and he did not live in the hall, an instruction is not erroneous which assumes that defendant was transporting the whiskey. His temporary presence there with the whiskey was sufficient evidence that he was carrying it about with him.

3. INTOXICATING LIQUORS—*Presumption and Burden of Proof.*—In a prosecution for violation of the prohibition act, if accused wishes to rely upon any matter in defense, the burden of proof rests upon him.

4. INTOXICATING LIQUORS—*Transportation—Instructions—Surplusage—Harmless Error.*—An indictment charged accused with unlawfully transporting more than one quart of ardent spirits and the court instructed the jury that, "You must believe beyond a reasonable doubt that he had this liquor where the law prohibits, and I have told you where he could have it and where he could get it." It was objected to this instruction that defendant was not charged in the indictment with unlawfully keeping or storing the liquor.

   Held: That upon this point, without conceding that the instruction, when viewed as a whole, was in any respect erroneous, it is sufficient to say that the jury found the defendant guilty, not of having or receiving the whiskey, but of transporting it contrary to law. Upon the facts stated, and

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in the absence of any conflict of evidence, the instruction could not have prejudiced the defendant, since he was clearly guilty of the crime of which he was convicted; and the language complained of, while it may have been surplusage, cannot be regarded as harmful error.

Error to a judgment of the Circuit Court of Wise county.

Affirmed.

The opinion states the case.

A. N. Kilgore, for the plaintiff in error.

John R. Saunders, Attorney- General, and *J. D. Hank, Jr., Assistant Attorney-General,* for the Commonwealth.

KELLY, J., delivered the opinion of the court.

This case is brought here by Lee Carter, hereinafter designated as the defendant, who was indicted, tried and convicted for an alleged violation of the statute familiarly known as the Mapp prohibition law. The indictment contained two counts, the first charging him with unlawfully transporting more than one quart of ardent spirits, and the other charging him with unlawfully receiving such ardent spirits. The jury found him guilty only upon the first count, and the second may, therefore, be disregarded.

A demurrer to the indictment, which was overruled, raised certain constitutional questions which, subsequent to the granting of the writ of error herein, were settled adversely to the contention of he defendant. *Pine & Scott* v. *Commonwealth,* 121 Va. 812, 93 S. E. 652; *Cochran* v. *Commonwealth,* 122 Va. 801, 94 S. E. 329.

The defendant was arrested in the town hall at Norton; he was intoxicated, and had on his person two bottles, both of which contained whiskey. He made no statement at the time and did not testify or offer any evidence at the trial.

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The record does not disclose where he got the whiskey, what he was doing in Norton, whence he came or whither he was bound, except that he resided at or near the neighboring town of Glamorgan.

The assignment of error which is now chiefly relied upon (the demurrer to the indictment having been abandoned) arises upon the following instruction given to the jury over the defendant's objection:

"Gentlemen of the jury, under that law, after the 1st day of November, the only way you can receive liquor is by written order sent out of the State. By sending a written order out of the State somewhere, you can buy a quart every thirty days and receive it from the express company by making affidavit that you have not received any, in this case, from the 1st day of November. You may carry it from the express office to your home, or if you are a *bona fide* traveler, if you were going to Cincinnati, Louisville, or Washington city on business, not to buy liquor, but going on other business, and you had not received a quart of liquor within thirty days, you could get a quart and put it in your grip, not in your pocket, and bring it home with you; you have no right to receive a quart and put it in your pocket and carry it all over the country. You must believe beyond a reasonable doubt that he had this liquor where the law prohibits, and I have told you where he could have it and how he could get it. You are not allowed to have liquor except at your home. He can have it at his home, or he may get a quart every thirty days; or he can have a gallon or two gallons at his home, and that is *prima facie*, even at his home, that he is a liquor seller, but the party would have the right to come in and show that he was not a liquor seller, but having any quantity of liquor on his person outside of his home, except by a *bona fide* traveler is illegal, except a *bona fide* traveler, or carrying it from the express office home."

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In discussing this instruction two preliminary propositions were advanced by counsel for defendant: First, that the Commonwealth failed to prove that the alleged offense was committed subsequent to November 1, 1916, the date when the Mapp law (laws 1916, c. 146) took effect; and, second, that the Commonwealth failed to prove that the defendant had more than one quart of liquor in his possession. Neither of these propositions can be maintained. The record plainly shows that the offense was committed on the 7th of November (election night) next preceding the trial in April, 1917, and the petition upon which this writ of error was granted expressly states that only two witnesses testified in the case, and that both fixed the date as November 7, 1916. Equally clear is the proof (if it be material) that the defendant had in his possession more than a quart of liquor. He had two quart bottles in his hip pockets; both bottles contained whiskey and one of the bottles was full.

It was further insisted that the instruction improperly and unlawfully distinguished between the right of a person to carry whiskey in his baggage and his right to carry it in his pocket. This distinction, however, is immaterial in the present case, because, as we have seen, the defendant had in his possession more than the law allowed, even if it be conceded that having it in his pockets was equivalent to having it in his baggage.

What may perhaps be regarded as the chief objection to the instruction is that it improperly assumed that the Commonwealth had proved that the defendant was transporting the whiskey. We are unable to accept this view. The defendant did not live in the town hall, and his temporary presence there with the whiskey was sufficient evidence that he was carrying it about with him. If he wished to rely upon any matter in defense the burden rested upon him. *Lucchesi* v. *Commonwealth,* 122 Va. 872, 94 S. E. 925.

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Further objection is urged to that part of the instruction which said to the jury, "You must believe beyond a reasonable doubt that he had this liquor where the law prohibits, and I have told you where he could have it and where he could get it." The argument is that this language was improper because the defendant was not charged in the indictment with unlawfully keeping or storing the whiskey. Upon this point, without conceding that the instruction, when viewed as a whole, was in any respect erroneous, it is sufficient to say that the jury found the defendant guilty, not of having or receiving the whiskey, but of transporting it contrary to law. Upon the facts already stated, and in the absence of any conflict of evidence, the instruction could not have prejudiced the defendant, since he was clearly guilty of the crime of which he was convicted; and the language complained of, while it may have been surplusage, cannot be regarded as harmful error.

The judgment was right and it must be affirmed.

Affirmed.

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Syllabus.

Staunton.

COLLINS V. COMMONWEALTH.

September 19, 1918.

1. CONFESSIONS—*Admissibility—Judicial and Extra-Judicial Confessions.*—Accused was brought before a justice of the peace upon a warrant charging him with the following offenses, namely, that he did "sell, give away, offer, keep and expose for sale, transport and aid in procuring ardent spirits contrary to law." The justice did not try the accused on the charges in the warrant mentioned, (and indeed had no jurisdiction so to do) but there was testimony that when the accused was brought before the justice, the justice asked the accused what he wanted to do, and the latter said "he wanted to plead guilty to the charge."

   Held: That accused's statement that "he wanted to plead guilty to the charge" was not a judicial confession, since it was not before a court competent to try the pending prosecution.

2. CONFESSIONS—*Admissibility—Judicial and Extra-Judicial Confessions.*—The statement of accused in the instant case before the justice that "he wanted to plead guilty to the charge," although it could not have been relied on by the Commonwealth as *conclusive* of the guilt of the accused of the offenses charged in the warrant upon which he was brought before the justice of the peace, yet such statement was admissible in evidence as an extra-judicial confession for the consideration of the jury upon the same charges contained in the indictment which were contained in the warrant. Such evidence was not inadmissible merely because insufficient in itself to prove such charges.

3. CONFESSIONS—*Sufficiency to Prove Charge.*—In the instant case the statement of the accused before the justice of the peace was in itself alone insufficient evidence of a confession of the offense of the transportation of liquor charged in the indictment. In view of the number of the charges in the warrant and the absence of evidence showing that the warrant was ever read to the accused or that he understood at the time he made such statement what all of such charges were, there was an absence of proof that in making such statement the

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accused intended to say that he wanted to plead guilty to all of such charges, the indication, indeed, from the language the accused used, that he wanted to plead guilty "*to the charge*," being that he meant to say that he wanted to plead guilty to only one charge.

4. CONFESSIONS—*Sufficiency to Establish Fact.*—Evidence as to confessions of parties is intrinsically weak and is inconclusive to establish a fact without the aid of other testimony.

5. CRIMINAL LAW—*Corpus Delicti—Confessions.*—The *corpus delicti* cannot be established by the confession of an accused person uncorroborated by other evidence.

6. CRIMINAL LAW—*Corpus Delicti—Confessions—Intoxicating Liquors.*—In the instant case, the *corpus delicti*—the unlawful transportation of the whiskey—was proved by the direct testimony of the officer making the arrest, independently of the admission of the accused that it was his whiskey.

Held: That the evidence was sufficient to support the verdict of the jury finding the accused guilty of transporting whiskey contrary to law.

7. INTOXICATING LIQUORS—*Presumptions and Burden of Proof—Possession of Ardent Spirits—Sale of Liquor.*—The *prima facie* presumption raised by section 65 of the prohibition act from the possession by any person of any ardent spirits at any place other than his home, extends no further than the presumption that such person possesses such distilled liquor *for the purpose of sale.* Such possession does not of itself furnish any evidence of any sale actually made—it being *prima facie* evidence only of the contemplated selling thereof by such possessor of the liquor. Such possession with such purpose, does, it is true, constitute in itself an offense under the statute, but it is not the offense of "selling" of which the accused was found guilty in the instant case.

8. INTOXICATING LIQUORS—*Verdict—Evidence to Support.*—In a prosecution for violation of the prohibition act, the jury found defendant guilty of transporting and selling whiskey contrary to law. The penalty imposed by the verdict did not exceed the minimum penalty for transporting. There was no evidence to support that portion of the verdict which found the accused guilty of selling whiskey contrary to law.

Held: That although the court below erred in declining to set aside that portion of the verdict which found accused guilty of selling, yet the error was harmless, since the jury imposed no penalty for that offense.

9. AUTREFOIS, ACQUIT AND CONVICT—*Verdict Finding Accused Guilty of Two Offenses.*—In the instant case, it was urged that the record did not show for which offense mentioned in

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the verdict the fine and imprisonment were imposed—the offense of transporting, or that of selling the liquor—and, hence, that the verdict should have been set aside by the trial court, because the accused cannot plead the record in this case as a bar to future prosecution.

Held: That the record of said verdict shows that the accused was convicted of both of the offenses last named. Such conviction was in effect an acquittal of all the other offenses charged in the indictment. The plea of *autrefois convict* as to both of the former and the plea of *autrefois acquit* as to all of the latter offenses are made available to the accused by the record in the instant case.

Error to a judgment of the Circuit Court of Wise county.

Affirmed.

Omitting the formal parts thereof, the indictment against the accused was as follows:

"* * that App Collins * * within one year next prior to the finding of this indictment and since the 1st day of November, 1916, in the said county of Wise, did unlawfully manufacture, transport, sell, offer, keep, store, and expose for sale, give away, dispense, solicit, advertise and receive orders for and aid in procuring ardent spirits * *."

There was a trial by jury resulting in the following verdict:

"We, the jury find the defendant guilty of transporting and selling whiskey contrary to law and assess his fine at $50.00 and sixty days in the county jail."

There was direct evidence of an officer who arrested the accused at Glamorgan, in Wise county, as follows:

"I saw two men coming into Glamorgan from the direction of Roberts Coal Plant, each of them had a sack with something in the sacks on their backs which looked like a jug. I intercepted them and told them to consider themselves under arrest. I grabbed one of them and a scuffle

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ensued, and we rolled over the bank into a swamp. This man, as we went over the bank, dropped his jug on the ground and broke it. This jug contained corn whiskey. After we went over the bank into the swamp, this man got away from me. Mr. Riddle, who was out there with me, after the one I was after made his escape, called to me "here is your man," and when I went back to where he was he had Mr. Collins in custody. We made search around there in the dark and found two gallons of liquor in a sack above a stump off some distance from where Collins, the defendant, was; but I do not know whose liquor it was. We started to carry Collins on and bring him to the court house and we came upon a car setting in the road and in this car a man was sleeping. When we attempted to wake this man Collins escaped. We pursued him but did not capture him until early next morning, when he was *cought* near the same place. When Riddle *cought* him he had lost his hat and had come back with another man to look for the hat and was arrested.

"At the time he got away from us at the car, he ran off with a pair of handcuffs on and when we arrested him next morning, they had been removed. After we got him the second time, I was bringing him to jail, and *he told me it was his whiskey and offered to give it to me* if I would let him go. He further said he would give me $5.00 to let him go. I told him I had been in the business too long that it would not work."

CROSS-EXAMINATION.

"By A. N. Kilgore:

"I know nothing about the defendant having sold any liquor contrary to law. I never bought any of him, nor know of any one else buying from him. I will not state that the whiskey I found was the property of the defend-

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ant. I do not know of my own personal knowledge that the sack I saw the defendant with contained a jug with whiskey in it. All I know is after he was arrested, some little distance from where he was arrested Mr. Riddle found the sack with two gallons of whiskey in it. I broke up the whiskey under the direction of the sheriff and J. M. McNeil, justice of the peace * *."

On the arrest of the accused he was brought before a justice of the peace upon a warrant charging him with the following offenses, namely, that he did "* * in said county sell, give away, offer, keep and expose for sale, transport and aid in procuring ardent spirits contrary to law * *."

The justice did not try the accused on the charges in the warrant mentioned (and indeed had no jurisdiction so to do), but there was testimony that when the accused was brought before the justice, the justice asked the accused what he wanted to do, and the latter said "he wanted to plead guilty to the charge."

The foregoing constitutes, in substance, all of the material evidence for the Commonwealth.

There was no evidence introduced in behalf of the accused.

Upon the trial of the case, the accused moved the trial court to exclude all of the evidence introduced in behalf of the Commonwealth as not admissible under the indictment, which motion was overruled. This action of the court below is the basis of one of the assignments of error.

Upon the rendition of the verdict aforesaid the accused moved the trial court to set it aside and grant him a new trial upon the grounds that such verdict was contrary to the law and the evidence and because without sufficient evidence to support it. This motion was also overruled and the judgment complained of was entered imposing a fine of $50.00 upon the accused and sentencing him to confinement for thirty days in the county jail, which action of the trial

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court is made the basis of the remaining and only other assignment of error which is relied on by the accused.

Kilgore & Kiser, for the plaintiff in error.

Jno. R. Saunders, Attorney-General, and *J. D. Hank, Jr., Assistant Attorney-General*, for the Commonwealth.

SIMS, J., after making the foregoing statement, delivered the following opinion of the court:

The two assignments of error above noted raise the following points for decision, which will be disposed of in their order as stated below.

1. It is urged in behalf of the accused that his statement before the justice of the peace that "he wanted to plead guilty to the charge" was not a judicial confession, since it was not before a court competent to try the pending prosecution.

This position is well taken. Wharton's Cr. Ev. (9th ed.), sec. 638. Such statement, therefore, could not have been relied on by the Commonwealth as *conclusive* of the guilt of the accused of the offenses charged in the warrant upon which he was brought before the justice of the peace. However, this did not render such statement of the accused inadmissible in evidence as an extra-judicial confession for the consideration of the jury upon the same charges contained in the indictment which were contained in the warrant. *Idem.* secs. 625-6, 631. Such evidence was not inadmissible merely because insufficient in itself to prove such charges. *Idem.* 632.

2. It is alike urged that there is no evidence of the guilt of the accused of the transportation of whiskey other than his confession, before the officer who arrested him, of the related fact that the liquor which was taken in charge by

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the officer at the time of the arrest, was the whiskey of the accused, since the statement of the accused before the justice of the peace is not shown by the evidence to have been an admission by him of that precise crime; and it is urged that since guilt of the accused cannot be established solely by his confession, without the aid of other testimony, the verdict of the jury finding the accused guilty of transporting the whiskey, as well as of the selling thereof, should have been set aside as without sufficient evidence to support it.

It is true that in so far as the statement of the accused aforesaid before the justice of the peace is concerned, it must be considered as in itself alone insufficient evidence of a confession of the offense of the transportation of liquor charged in the indictment. Underhill on Cr. Ev. (1898) sec. 125, p. 160. In view of the number of the charges in the warrant and the absence of evidence showing that the warrant was ever read to the accused or that he understood at the time he made such statement what all of such charges were, there was an absence of proof that in making such statement the accused intended to say that he wanted to plead guilty to all of such charges, the indication, indeed, from the language the accused used, that he wanted to plead guilty *"to the charge,"* being that he meant to say that he wanted to plead guilty to only one charge. There was the consequent uncertainty thus arising as to which charge in the warrant the accused thus indicated his guilt. It is also true that evidence as to confessions of parties is intrinsically weak and is inconclusive to establish a fact without the aid of other testimony (*Homer* v. *Speed,* 2 Pat. & H. 616), and in criminal cases the *corpus delicti* cannot be established by the confession of an accused person uncorroborated by other evidence. Wharton's Cr. Ev. (9th ed.), sec. 633; *Cochran's Case,* 94 S. E. 329; but in the instant case, the *corpus delicti*—the unlawful transportation of the

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whiskey—was proved by the direct testimony of the officer making the arrest, independently of the admission of the accused that "It was his whiskey." Under the circumstances narrated in the testimony of such officer above quoted, the jury were warranted in drawing the inference of fact that such liquor was the same as that which the officer saw being transported either on the back of the accused or on the back of the person who was with him, for the accused. Since the accused admitted that it was his liquor, it followed that the transportation thereof, aforesaid, was either by him or by his agent in his presence and under his direction. *Qui facit per alium, facit per se.* Hence, the confession of such related fact—the ownership of the whiskey—when considered by the jury in connection with the direct and independent testimony for the Commonwealth that such whiskey was being unlawfully tranported at the time of the arrest of the accused, and the other direct evidence aforesaid, was amply sufficient to support the verdict of the jury in finding the accused guilty of "transporting * * whiskey contrary to law." The penalty imposed by the verdict did not exceed what they were authorized by the statute to impose for such offense and was indeed the minimum penalty for such offense. (See Acts Assem. 1916, p. 215.)

3. It is also urged in behalf of the accused that there was no evidence to support that portion of the verdict of the jury which found the accused guilty of "selling whiskey contrary to law."

We are of opinion that this position is well taken. There is no evidence whatever in the instant case tending to show any selling of whiskey by the accused.

The Commonwealth relies upon the *prima facie* presumption raised by the possession by the accused of the whiskey in question under section 65 of said act, to sustain the verdict of the jury in the particular now under consideration. The provision of such section of the statute thus relied on is as follows:

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"The possession by any person, of any ardent spirits, at any place other than his home, except as provided in this act, and the possession in his home of more than one gallon of distilled liquor, one gallon of wine, or three gallons of beer, or other malt liquor, at any one time, shall, in any proceeding or prosecution under this act, be *prima facie* evidence that such person possesses such distilled liquors, wine and malt liquor for the purpose of sale."

The *prima facie* presumption raised by such statute from the possession by any person of any ardent spirits at any place other than his home (which the evidence for the Commonwealth in the instant case showed was true of the accused), extends no further, however, than the presumption "that such person possesses such distilled liquor * * *for the purpose of sale.*" (Italics supplied). *Pine & Scott* v. *Commonwealth,* 93 S. E. 652. Such possession does not of itself furnish any evidence of any sale actually made,—it being *prima facie* evidence only of the contemplated selling thereof by such possessor of the liquor. Such possession, with such purpose, does, it is true, constitute in itself an offense under the statute, but it is not the offense of "selling" of which the accused was found guilty in the instant case. That portion of the verdict which included the additional offense of "selling" aforesaid, was, therefore, not supported by any evidence, and the court below erred in declining to set aside such portion of the verdict. However, since the jury imposed no penalty, for such additional offense (they having imposed only a penalty which was the minimum penalty for the offense of transporting liquor covered by the verdict, as above stated), the accused suffered no hardship or ill-effect because of such additional offense being included in the verdict, and the error of the court below in that particular, was, therefore, harmless, and hence is not reversible error.

4. It is urged that the record does not show for which

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offense mentioned in the verdict the fine and imprisonment were imposed—the offense of transporting, or that of selling the liquor—and, hence, that the verdict should have been set aside by the trial court, because the accused cannot plead the record in this case as a bar to future prosecution.

The record of said verdict shows that the accused was convicted of both of the offenses last named. Such conviction was in effect an acquittal of all the other offenses charged in the indictment. The plea of *autrefois convict* as to both of the former and the plea of *autrefois acquit* as to all of the latter offenses are made available to the accused by the record in the instant case.

For the foregoing reasons we find no error in the judgment complained of, and it will be affirmed.

Affirmed.

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Staunton.

STAPLETON V. COMMONWEALTH.

September 19, 1918.

1. HOMICIDE — *Murder in First Degree — Previously Existing Grudge.*—A homicide in execution of a previously existing grudge, and pursuant to a previously declared purpose, is murder in the first degree.
2. HOMICIDE—*Instructions Read As a Whole—Burden of Proof—Previously Expressed Grudge—Case at Bar.*—In the instant case the court instructed the jury, at the request of the Commonwealth, that if accused killed deceased in execution of a previously existing grudge, and pursuant to a previously declared purpose, the homicide was murder in the first degree. It was objected to this instruction that it failed to place upon the Commonwealth the burden of proving the existence of the grudge and the declared purpose to kill, and, further, ignored the defendant's theory of the killing. The instructions given upon the trial fully and fairly presented to the jury the respective theories and contentions of the Commonwealth and the accused. Under the familiar rule applying to both civil and criminal cases, instructions are to be read as a whole. When so read in this case, the alleged defects in the Commonwealth's instruction in question disappear. Instructions given for the defendant, in no way conflicting with those given for the Commonwealth, not only presented every aspect of the defense relied upon, but repeated and emphasized the burden upon the Commonwealth to prove, to the exclusion of all reasonable doubt, every element necessary to a conviction under the indictment.
3. HOMICIDE—*Threats—Uncommunicated.*—On a trial for homicide the jury were instructed, at the request of the Commonwealth, that threats made by the deceased against the prisoner were to be received with great caution, and it must be shown that the threats were communicated to the prisoner prior to the killing, before they could be considered as affording any justification of the homicide. The jury were also instructed, at the request of the accused, that if threats were made by

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deceased against defendant, such threats are evidence to be considered by the jury in determining the reasonableness and *bona fides* of the defendant's plea of self-defense and of his belief that the deceased meant to kill or do him some serious bodily harm.

Held: That the first of these instructions stated the law correctly, and if it be conceded that the second was correct, it was not in substantial conflict with the first. But the Supreme Court of Appeals did not find it necessary to decide whether the second instruction was right, and expressed no opinion when, if ever, uncommunicated threats are admissible in evidence.

4. HOMICIDE—*Murder—Malice—Accused Previously Arming Himself.*—On a trial for homicide, the court instructed the jury that a person reasonably apprehending attack has a right to arm himself for his necessary self-defense, and also that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any or upon slight provocation, is *prima facie* wilful and premeditated killing. These two instructions were given upon opposing theories, and there was no prejudicial conflict between them.

5. HOMICIDE—*Murder—Malice—Accused Previously Arming Himself.*—On a trial for homicide, when the court told the jury that the accused had the right to arm himself, it was not error to also instruct them that the use of the weapon was sufficient to raise a presumption of malice.

Error to a judgment of the Circuit Court of Scott county.

Affirmed.

The opinon states the case.

W. S. Cox, G. Claude Bond and *Coleman & Carter*, for the plaintiff in error.

Jno. R. Saunders, Attorney-General, J. D. Hanks, Jr., Assistant Attorney-General, and *F. Briggs Richardson*, for the Commonwealth.

KELLY, J., delivered the opinion of the court.

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John W. Stapleton, indicted for the murder of John B. Shoemaker, was convicted of voluntary manslaughter, and brings the case here upon a writ of error.

The evidence, which was conflicting, need not be reviewed in detail. The deceased, who was unarmed, was shot to death by the accused under circumstances which, according to the testimony for the Commonwealth, fully warranted the verdict. The accused gave a wholly different version and one which, if true, would have entitled him to acquittal on the ground of self-defense. His counsel practically concede that the verdict of the jury conclusively settles this conflict against him in this court; but it is insisted that there was error in the instructions for which the judgment should be reversed.

Instruction No. 9, given for the Commonwealth and assigned as error, was as follows: "That if the jury believe from the evidence that previous to the time of the killing there was a grudge on the part of the prisoner towards the deceased, and that the prisoner had previously declared his purpose to kill the deceased or inflict upon the deceased serious personal hurt if the deceased interfered with him, and that he killed the deceased because of it in pursuance of such declared purpose on the grudge aforesaid, then such killing was wilful, deliberate, and premeditated, and is murder in the first degree."

There was no error in this instruction. It is plain and settled law that a homicide in execution of a previously existing grudge, and pursuant to a previously declared purpose, is murder in the first degree. *Gray's Case* (Instruction No. 2), 92 Va. 773, 22 S. E. 858. This proposition is not, as we understand, controverted, but it is urged that the instruction in question fails to place upon the Commonwealth the burden of proving the existence of the grudge and the declared purpose to kill, and, further, ignores the defendant's theory and narrative of the killing.

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There were thirty-one instructions given upon the trial—nineteen for the Commonwealth and twelve for the defendant. These instructions fully and fairly presented to the jury the respective theories and contentions of the Commonwealth and the accused. Under the familiar rule applying to both civil and criminal cases, instructions are to be read as a whole. When so read in this case, the alleged defects in the Commonwealth's instruction No. 9 disappear. Instructions given for the defendant, in no way conflicting with those given for the Commonwealth, not only presented every aspect of the defense relied upon, but repeated and emphasized the burden upon the Commonwealth to prove, to the exclusion of all reasonable doubt, every element necessary to a conviction under the indictment.

The next objection urged against the instructions arises out of an alleged inconsistency between No. 11, given for the Commonwealth, and No. 9, given for the defendant. These instructions, in the order just named, were as follows:

No. 11. "The court tells the jury that evidence of threats made by the deceased against the prisoner, are to be received by them with great caution; and although such threats may be proved to have been made, yet, it must be shown to the satisfaction of the jury that these threats were communicated to the prisoner prior to the killing, before they can be considered as affording any justification of the homicide."

No. 9. "The court further tells the jury that although mere threats do not of themselves excuse a homicide, yet, if they believe from the evidence that threats were made by the deceased against the defendant, such threats are evidence to be considered by the jury in determining the reasonableness and *bona fides* of the defendant's plea of self-defense and of his belief that the deceased meant to kill or do him some serious bodily harm."

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The first of these instructions unquestionably stated the law correctly. *Lewis* v. *Commonwealth* (Instruction No. 4), 78 Va. 733; and if it be conceded that the second was correct, it was not in substantial conflict with the first. The accused had introduced proof of certain threats against him by the deceased. These threats had not been communicated to the accused at the time of the homicide. They were offered on the theory that they would throw light upon the mental attitude of the deceased and thus enable the jury to better weigh the testimony of the accused in support of his claim of self-defense. There is, of course, no contention that these uncommunicated threats could possibly have influenced the prisoner at the time of the shooting. If admissible at all, they were so only because they might have tended to corroborate the prisoner in his statement as to the manner and apparent purpose of the deceased, and thus tended to establish the good faith of the defendant's contention that he acted in self-defense. The instruction dealt only with this aspect of the case. The evidence of the uncommunicated threats had already been admitted; the instruction as asked by the prisoner was given; and he thus got the full benefit of his contention in this respect. The court was clearly right in giving instruction No. 11 for the Commonwealth, and it is unnecessary to decide whether instruction No. 9 for the defendant was also right. The defendant certainly got all that he was entitled to in this regard, and we may very well say, as did Judge Riely in *Gray's Case, supra,* that " any discussion of the important question, when, if ever, uncommunicated threats are admissible in evidence, would be out of place." The question is discussed in Wigmore on Evidence, secs. 110 and 247, but has not, we believe, been passed upon by this court.

On behalf of the Commonwealth, the court gave instruction No. 6, as follows: "That whoever kills a human being with malice aforethought is guilty of murder and that a

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murder that is perpetrated by poison, lying in wait or any other kind of wilful, deliberate and premeditated killing, is murder in the first degree. That a mortal wound given with a deadly weapon in the previous possession of the slayer without any or upon slight provocation, is *prima facie* wilful, deliberate and premeditated killing, and throws upon the defendant the necessity of proving extenuating circumstances."

Counsel for the accused concede that this instruction is correct as an abstract legal proposition, but insist that it was wrong under the facts in the instant case, especially because of its alleged conflict with instruction No. 11, given for the defense, which was as follows: "The court further tells the jury that when a person reasonably apprehends that another intends to attack him for the purpose of killing him or doing him serious bodily harm, then such person has a right to arm himself for his own necessary self-defense."

These two instructions were given upon opposing theories, and it is clear under our decisions that there is no prejudicial conflict between them. With reference to the Commonwealth's instruction No. 6, it is sufficient to say that there is nothing in the facts of the case at bar to substantially distinguish it from the many homicide cases in which this court has approved similar instructions where the law of self-defense was invoked. The argument of counsel for petitioner seems to be that when the court told the jury that the accused had the right to arm himself it was error to also instruct them that the use of the weapon was sufficient to raise a presumption of malice, since no inference of malice would be drawn and no presumption arise from the use of any instrument which he had a legal right to have in his possession. This argument, however, is not new, and has been denied any force by the previous decisions of this court. *Honesty* v. *Commonwealth*, 81 Va. 283-292; *Jones* v. *Commonwealth*, 100 Va. 842, 41 S. E. 951.

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There were other objections to the instruction, and there was also an assignment of error based upon the refusal of the court to grant a new trial for after-discovered evidence. We have carefully considered the questions thus raised. They are in no respect novel or new, and the action of the trial court thereon was so plainly right upon principle and precedent that we do not feel warranted in discussing them. Such a discussion could only result in a needless repetition of what this court has already often said, and a useless citation of perfectly familiar authorities.

The judgment complained of is affirmed.

Affirmed.

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Account Stated.—*Burden of Proof.*—Burden of proving that objection was made within a reasonable time. Buchanan, Adm'r *v.* Higginbotham, 662.

Time of Making Objections.—Objections to accounts rendered, which will prevent them from being deemed stated acounts, must be made within a reasonable time; and the burden of proving that objection was made within a reasonable time rests upon the party contesting the account so rendered; the rule is founded on the acquiescence of the party charged. Buchanan, Adm'r *v.* Higginbotham, 662.

Transactions between Others than Merchants.—While the doctrine as to accounts stated may originally have had its origin in transactions between merchants, it has quite generally been extended to all cases where the relation of debtor and creditor exists. Buchanan, Adm'r *v.* Higginbotham, 662.

Between merchants, the failure to dispute an account rendered, after a lapse of a reasonable time, amounts to an admission of its correctness, and even though an account rendered between others than merchants may not become technically an account stated, a retention without objection, of the account by the party to whom rendered, may be taken to show an implied admission or acquiescence in its correctness, the weight of the testimony being for the consideration of the jury, under the circumstances of the particular case. Buchanan, Adm'r *v.* Higginbotham, 662.

ACTIONS.

Assault and Battery.— See HUSBAND AND WIFE.

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ACTIONS—Continued.

Husband and Wife.—See HUSBAND AND WIFE.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

Right of Action.—A right of action at law can in no case exist unless, (a) the plaintiff be found to have had, at the time alleged cause of action arose, a substantive civil right, the breach or invasion of which right (constituting in the case of a tort a civil wrong) gave rise to a cause of action; and (b) the plaintiff be found to have had, at the time the action is instituted, a civil remedy by action at law. Keister's Adm'r *v.* Keister's Ex'ors, 157.

State.—See STATE.

ACT OF GOD.

Waters and Watercourses.—See WATERS AND WATERCOURSES.

ADEQUATE REMEDY AT LAW. See MANDAMUS.

ADVANCEMENTS.

Power to Make Advancements.—See WILLS.

Presumptions and Burden of Proof.—In cases of alleged advancements the mere *factum* of a substantial gift, unexplained, is in itself evidence that the gift was intended as an advancement. The latter may be inferred from the former. Johnson *v.* Mundy, 730.

Witnesses.—*Transactions with Deceased Persons.*—In a suit to determine whether certain gifts from a parent to a child and her husband were gifts or advancements, the donor being dead the recipients of the gifts are not competent witnesses to explain that the gifts were not intended as advancements. Johnson *v.* Mundy, 730.

ADVERSE POSSESSION.

Hostile and Exclusive Possession.—The occupancy which is necessary to support a claim of title by adverse possession must be both hostile and exclusive. Cumbee *v.* Ritter, 448.

ADVICE OF COUNSEL. See MALICIOUS PROSECUTION.

AFFIDAVITS.

Jurors.—See NEW TRIALS.

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AGENCY.

Labor Agents.—See LABOR.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

ANSWERS.

Answer Not under Oath.—If a plaintiff, in a bill for equitable relief (which the court has jurisdiction to give independent of discovery), prays for certain disclosures of fact by the defendants, in aid of such equitable relief, but waives answer under oath, the plaintiff cannot except to the answer as insufficient because the respondents, although answering fully as to all other portions of the bill, fail to make the discovery asked for. In the absence of statute, or some rule of court authorizing it, there can be no discovery compelled by a bill waiving answer under oath, and section 3281 of the Code of 1904 has not changed this established rule of procedure in chancery. Johnson *v.* Mundy, 730.

An answer not under oath is not free from all exception for insufficiency. But the requirements of modern equity procedure as to affirmative statements of defense in an answer, when considered merely as a pleading, does not lead to the result of allowing a plaintiff to compel a respondent to go beyond traversing each and all of the material allegations of the bill and giving an affirmative statement of facts constituting his own defense, and compel him to also add a statement of facts not a part of his defense, but a part of the plaintiff's case, and which the plaintiff needs and seeks *as evidence* to support his case. Johnson *v.* Mundy, 730.

In the instant case where complainant waived an answer under oath, the defendants having answered fully all of the allegations of the bill, except the interrogatory, they could properly refrain from answering further, and this notwithstanding the general rule that having answered defendant must answer fully. Johnson *v.* Mundy, 730.

Discovery.—See DISCOVERY.

Double Office.—An answer in cases where relief is sought, properly consists of two parts; and in fact performs a double office. It consists, first, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of defendant on oath, as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually addressed. Johnson *v.* Mundy, 730.

Exceptions.—See *infra*, "Answer Not Under Oath."

Mandamus.—See MANDAMUS.

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ANSWERS—Continued.

Pleading and Evidence.—See *infra*, "Double Office."

Sufficiency.—The answer, as a pleading, may traverse each and all of the material allegations of the bill directly, distinctly, categorically and unequivocally, but that is not enough, if the plaintiff insists upon a full answer. It must go further and state affirmatively the facts constituting the defense of the respondent, whether that defense is in conflict, in whole or in part, with the allegations of fact in the bill, or is in confession and avoidance. Johnson *v.* Mundy, 730.

The defense set up in the answer should be a sufficient defense; and the plaintiff is entitled to insist upon an answer, not only according to the "knowledge" of the defendant, but also "as to his remembrance, information and belief." Johnson *v.* Mundy, 730.

Time for Filing.—Although it is true that under section 3275 of the Code of 1904 a defendant may be allowed, under certain restrictions, to file his answer at any time before final decree, that does not affect the right of the plaintiff, by the proper proceeding, to have the court compel him to answer sooner. Johnson *v.* Mundy, 730.

APPEAL AND ERROR.

Affirmance.—See *infra*, "Conflicting Evidence," "Demurrer to Evidence Rule," "Issues to Jury."

In the instant case the trial court permitted each of the witnesses (the purchaser and a witness for the seller) to give to the jury his construction of the meaning of the term "ordering out," and used in the contract of sale, and instructed the jury in accordance with that evidence. The jury found a verdict in favor of the purchaser, and under the demurrer to the evidence rule the verdict will not be disturbed by the Supreme Court of Appeals, unless there was some error to the prejudice of the sellers committed during the trial. Manor and Others *v.* Hindman, 767.

Divorce.—See *infra*, "Divorce."

Assignment of Errors.—See ASSIGNMENT OF ERRORS.

Conflicting Evidence.—In the instant case, upon the vital questions of fact, the evidence was irreconcilably conflicting. The conflict arose, however, from two opposing versions of possible facts under which the accident occurred. Either version might have been true, and the selection of the more credible one was exclusively within the province of the jury. No physical laws or facts prevent the acceptance of the testi-

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APPEAL AND ERROR—Continued.

Conflicting Evidence—Continued.

mony upon which the plaintiff sought and obtained the verdict, and the Supreme Court of Appeals could not, therefore, apply to the case, as defendant earnestly insisted it should, the rule of evidence applicable in cases where the court must either disregard the testimony, or accept the impossible as true. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

The verdict of a jury upon questions of fact, upon conflicting evidence, is conclusive as to such questions. Aetna Ins. Co. *v.* Aston, 327.

Where the trial court, upon conflicting evidence, determined a question of fact, its finding will not be disturbed upon writ of error. Hilliard *v.* Union Trust Co., 724.

Where issues are fairly submitted to a jury upon conflicting evidence, the verdict of the jury, sanctioned by the trial court, is generally accepted as conclusive. Stuart, Gov. *v.* Smith-Courtney Co., 231.

In considering an assignment of error that the trial court erred in its refusal to set aside the verdict and grant the defendant a new trial, the Supreme Court of Appeals cannot enter upon any attempt to reconcile the conflicts in the evidence, its sole function being to determine whether the record discloses sufficient evidence of probative value to support the verdict, if such evidence was found credible by the jury. Hunter *v.* Burroughs, 113.

Decrees Appealable.—See *infra*, "Final Judgments and Decrees," "Principles of the Cause."

Demurrer.—*Specifically Stating Grounds of Demurrer.*—Where the objections on demurrer to certain counts in the declaration do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, but it does not appear from the record that any motion was there made by the plaintiff to require or that the court on its own motion required the grounds of demurrer relied on to be stated (section 3271, Code of 1904), and no objection is made by the plaintiff to the consideration of the assignments of error by the Supreme Court of Appeals, such assignments will be considered by that court. Hunter *v.* Burroughs, 113.

Demurrer to Evidence Rule.—See *infra*, "Affirmance."

The statutory rule (section 3484, Code of 1904), under which the Supreme Court of Appeals must consider the evidence when certified, cannot compel that court to accept as

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APPEAL AND ERROR—Continued.

Demurrer to Evidence Rule—Continued.

true what in the nature of things could not have occurred in the manner and under the circumstances narrated. Va. R. & P. Co. *v.* Bailey, 250. City of Charlottesville, *v.* Jones, 168.

After a verdict for plaintiff, the Supreme Court of Appeals must acept as true all of the facts favorable to the plaintiff which the evidence tended to establish. Clinchfield Coal Corp. *v.* Redd, 420.

Divorce.—In a suit by a wife against her husband, praying a divorce on the grounds of cruelty, desertion and incurable impotency, and for suit money, counsel fees and alimony, the husband answered, denying all of the allegations of the bill, and alleging desertion by his wife, without sufficient cause, and prayed that his answer might be treated as a cross-bill, and that he be decreed a divorce *a mensa* from his wife on account of such desertion. The judge of the trial court refused the prayer of the bill of the wife for a divorce, but granted the prayer of the husband's cross-bill, and awarded him a divorce *a mensa et thoro* on the ground of desertion, which was subsequently enlarged and merged into a decree of divorce from the bond of matrimony. After a careful consideration of the record, the Supreme Court of Appeals was unable to discover any substantial error to the prejudice of the appellant in the decrees of the trial court. McCormick v. McCormick, 778.

Effect Given Judgment of Trial Court.—Where a jury was waived and all questions of law and fact submitted to the trial court, and the evidence, and not the facts, is certified, the rule of decision in the appellate court is to give the judgment of the trial court the same effect as the verdict of a jury. Hilliard *v.* Union Trust Co., 724.

Where no controverted fact was passed on by the trial court, but solely a question of law, the judgment of the trial court is not entitled to the same weight as where given upon conflicting evidence upon a question of fact. Rinehart & Dennis Co. *v.* McArthur, 556.

The decree of the trial court is entitled to great respect, and is generally presumed to be right, but where the evidence was not taken before the trial court, but by depositions, and is conflicting, and involves not only the question of the credibility of the witnesses but the charge of fraud on the part of some of the parties who have testified in the cause, it is peculiarly a case for an issue to be tried by a jury, and if the

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APPEAL AND ERROR——Continued.

Effect Given Judgment of Trial Court—Continued.

chancellor has failed to order it, though not requested by the parties, his decree will be reversed. Catron *v.* Norton Hardware Co., 380.

Evidence.—See *infra*, "Demurrer to Evidence Rule."

Exclusion of Evidence.—See *infra*, "Harmless Error."

Exceptions and Objections.—See *infra*, "Injunctions," "Objection Not Raised Below."

Final Judgments and Decrees.—See FINAL JUDGMENTS AND DECREES.

Order Overruling Exceptions to Answer.—An order overruling exceptions to an answer for insufficiency is not a final decree or order, as that term is used in section 3454, Code of 1904, allowing appeals from such decrees or orders. Johnson *v.* Mundy, 730.

Finding of Court.—See *infra*, "Effect Given Judgment of Trial Court Where Jury Is Waived."

Harmless Error.—*Declaration in Malpractice.*—A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected that this count was demurrable because it failed to allege, except inferentially, that the plaintiff was in fact more susceptible to the influence of X-rays than other persons, and if such examination had been made it would have resulted in the discovery of such susceptibility. Held: That the point was well taken; that such allegation should have been made and distinctly made, with definiteness and certainty. An inferential allegation of such material fact was insufficient. But as the case did not turn upon the existence of any peculiar susceptibility of the plaintiff to X-rays, and the verdict was based upon other grounds, the error was harmless. Hunter *v.* Burroughs, 113.

Exclusion of Evidence.—Where a witness who has made certain official reports testified as to all pertinent or material facts contained in the reports, if there was any error in refusing to admit the reports, which could only be upon the theory that they had some additional sanction because they were alleged to be official reports, the error was clearly harmless. Stuart, Gov. *v.* Smith-Courtney Co., 231.

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APPEAL AND ERROR—Continued.

Harmless Error—Continued.

Instruction Favorable to Plaintiff in Error.—In a prosecution under the prohibition act, the court instructed the jury that it was unlawful for the defendant to keep or store for sale, gift or use, ardent spirits in any other place than in the *bona fide* home of himself. This is a mere inadvertence, for it is clearly unlawful to store ardent spirits for sale, even in a *bona fide* home; but inasmuch as the error is favorable to the plaintiff in error and not against his interest, it is harmless. Pettus *v.* Commonwealth, 806.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Irregularities.—The Supreme Court of Appeals does not sit to correct all irregularities that may occur on the trial of a cause, but only such errors and irregularities as are prejudicial to the substantial rights of the party assigning them. Rinehart & Dennis Co. *v.* McArthur, 556.

Irregularities in Favor of Party Prevailing.—Where the decision on the merits is in favor of the defendant in error, he cannot assign irregularities in the proceedings as error. Rinehart & Dennis Co. *v.* McArthur, 556.

Impossible Physical Facts.—Va. R. & P. Co. *v.* Bailey, 250; City of Charlottesville *v.* Jones, 682.

Instructions.—*Exception to Instructions.*—A general exception to all of a number of instructions, followed by specific objections to each, is a sufficient compliance with the statute; and to require a separate certificate, signed by the judge, to be appended to each instruction given or rejected, would introduce an inconvenient rule of practice not required by the statute, and needlessly encumber the record without any resultant benefit. Ratcliffe *v.* McDonald's Adm'r, 781.

Interest of Plaintiff in Error.—An instrument executed by a mother to her son, William C. T. Hilliard, concluded as follows: "And I do hereby constitute and appoint William C. T. Hilliard my true and lawful attorney in my name, but at his own costs and charges to take all legal measures which may be necessary to enforce the stipulations and agreement herein contained and to receive the moneys due or to grow due thereon now in the hands of the sheriff of Rockingham county, Virginia." Held: That it was the intention of the mother, by the writing in question, to constitute her son her attorney in fact to represent her in the litigation, and not to invest him with her interest in the proceeds of the sale of her land under the order of court; therefore, a motion to

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APPEAL AND ERROR—Continued.

Interest of Plaintiff in Error—Continued.

dismiss a writ of error on the ground that it was improvidently awarded, because the mother, the plaintiff in error, had previously conveyed all her interest in the subject matter of the litigation to her son, was overruled. Hilliard *v.* Union Trust Co., 724.

Issues to Jury.— See ISSUES TO JURY.

In the instant suits a majority of the court were of the opinion that there was sufficient evidence in the record to sustain the decree of the trial court in each of the cases, and that no issue out of chancery was necessary. Catron *v.* Norton Hardware Co., 380.

Judgment on Appeal.—In the instant case, in view of the fact that the record suggested the possibility that the defendants were overconfident in their view that a court of equity had no jurisdiction, and, therefore, failed fully to present the evidence upon which they relied in support of their claim of title, the decree of the lower court was affirmed by the Supreme Court of Appeals, without prejudice to the right of the defendants hereafter to assert their title to the property in an action of ejectment, if they sould be so advised. Cumbee *v.* Ritter, 448.

Law of the Case.— See LAW OF THE CASE.

Malicious Prosecution.—Where a declaration contained three counts, neither of which consisted of the single charge of false arrest and imprisonment, and the gravamen of each count rested upon a charge of malicious prosecution, and the case below was proceeded with by court and counsel as an action for malicious prosecution, the Supreme Court of Appeals will deal with the case as an action for malicious prosecution. Clinchfield Coal Corp. *v.* Redd, 420. See *infra*, "Harmless Error."

Mandamus.— See MANDAMUS.

Moot Questions.—By a decree of the lower court appellant was "perpetually enjoined from practicing medicine and exercising his profession as a practicing physician within a radius of fifteen miles from Laurelfork." After the cause was argued and submitted in the Supreme Court of Appeals, appellant died. The issue upon which the cause came to the Supreme Court of Appeals became a purely moot question, and nothing remained for it to do except to enter an order dismissing the cause without costs to either party. Branscome *v.* Cunduff, 352.

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APPEAL AND ERROR—Continued.

Moot Questions—Continued.

It was insisted by counsel for the appellant that in the instant case the controversy ought to be decided in order to settle the question of costs. Held: That the controversy in the case at bar having ceased to exist, leaving only moot questions, there could be no recovery for costs in the Supreme Court of Appeals, where such a judgment depends upon the substantial result of the litigation, and that the case must, therefore, be dismissed without costs to either party. Branscome *v.* Cunduff, 352.

Municipal Corporations.—*Change of Form of Government.*—See MUNICIPAL CORPORATIONS.

Objection for First Time on Appeal.— See *infra*, "Parties;" "Variance."

Objection cannot be made in the appellate court to the awarding of a mandamus where not mentioned in the petition for the writ of error. Rinehart & Dennis Co. *v.* McArthur, 556.

The record in the instant case did not disclose how the officer who arrested plaintiff derived his authority as an officer of the law, and plaintiff's counsel contended that there was no proof of his qualification as such, but the trial was proceeded with upon the apparent concession that he was an officer, the plaintiff in his own testimony referred to him as such, his official authority was not in any way challenged, and, under these circumstances, it was too late to raise the question for the first time on appeal. Clinchfield Coal Corp. *v.* Redd, 420.

Non-Jurisdictional Questions.—Speaking generally, it is the established rule that objections not raised in the lower court (or if in fact made, unless properly presented in the record) will not be considered in the appellate court. Of course, the rule is otherwise where the questions are jurisdictional. Hilliard *v.* Union Trust Co., 724.

If, however, the objection be that the trial court had no jurisdiction of the *subject matter* of the litigation, the objection may be made in the appellate court for the first time. Indeed, if the trial court had no jurisdiction of the *subject matter*, its judgment is a mere nullity and may be treated as such. It may be assailed, directly or indirectly, anywhere, at any time, in any way. Hilliard *v.* Union Trust Co., 724.

Parties.— See *infra*, "Interest of Plaintiff in Error."

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APPEAL AND ERROR—Continued.

Parties—Continued.

Objection for First Time on Appeal.—Where there is such a defect of parties to a suit that injustice may be done if the absent parties be not before the court, the Supreme Court of Appeals will remand the case in order that proper parties may be brought before the court, although no objection on that ground was made either in the trial court or on appeal. Jeffries *v.* Jeffries' Ex'or, 147.

Power of Attorney.— See *infra*, "Interest of Plaintiff in Error."

Presumption in Favor of Judgment.— There is every presumption that a statement in a decree is correct. Catron *v.* Bostic, 355.

"Principles of the Cause."—In a suit to determine whether certain gifts from a parent to a child and her husband were gifts or advancements, an order overruling plaintiff's exceptions to defendants' answer, which decided against the plaintiff a very important question to him, namely, the right to the relief sought by his bill of a discovery by the defendants of all sums of money or property received by them or either of them from the decedent, determined a rule of evidence by which the rights of the parties were to be finally worked out and adjudicated a "principle of the cause," and hence is appealable. Johnson *v.* Mundy, 730.

Streets and Highways.— See STREETS AND HIGHWAYS.

Variance.—An objection that the trial court erred in permitting the plaintiff to recover upon a different case from that made by his declaration, cannot be made for the first time on appeal, as it involved the ordinary quesion of a variance between the declaration and the proof. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Verdict.— See *infra*, "Effect Given Judgment of Trial Court."

APPEARANCES.

Infants.—See INFANTS.

ARREST.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

ASSAULT AND BATTERY.

Husband and Wife.—*Action by Wife.*—See HUSBAND AND WIFE.

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ASSIGNMENT OF ERRORS.

Exclusion of Evidence—Record.—Where an assignment of error complains of the action of the court in refusing to allow a witness to answer a question, the failure of the record to disclose by avowal or otherwise what answer the witness would have made, or what knowledge he had on the subject, is fatal to the assignment. Fardis *v.* E. I. DuPont, Etc., Co., 88.

Points Not Raised by Assignments.—Where an instruction is not free from all exception, but is not open to the objection urged against it in the assignments of error, the objection made in the assignments of error is the only objection which the Supreme Court of Appeals will consider. City of Charlottesville *v.* Jones, 582.

ASSIGNMENTS.

Acceptance.—An assignment as security for an existing debt is founded on a valuable consideration, and its acceptance will be presumed until the contrary appears. Rinehart & Dennis Co. *v.* McArthur, 556.

Form.—Equity looks at the substance of a transaction, and not its mere form. No particular form of words is necessary to constitute a valid assignment in equity of a chose in action. The intention of the assignor is the controlling consideration. If the owner of a chose in action, for a valuable consideration, signs and delivers a writing whereby he intends to part with his ownership, whether it be to the use of the assignee or of a third person, or to apply the proceeds to a specific purpose other than for the use and benefit of the assignor, it is a valid equitable assignment, regardless of the particular language used. It is sufficient if the debtor would be protected in making payment thereon. Rinehart & Dennis Co. *v.* McArthur, 556.

Insurance Policy.—See FIRE INSURANCE.,

Orders.—See ORDERS.

Presumption.—See *infra*, "Acceptance."

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Estoppel.—The vendor of lumber made an assignment for the benefit of his creditors and included in the assignment "all tne remainder of the purchase price due" from the vendees. Under the contract of sale title to the lumber had passed to the vendees. Held: That the acquiescence of the vendees in the assignment did not estop them from asserting title to the

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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—Continued.

Estoppel—Continued.

lumber, or any right of set-off against the purchase money for such lumber by reason of any advances or loans made by them to the vendor of the lumber under the contract. Ellis, Etc., Co. *v.* Hubbard, 481.

Title to Lumber Sold.—Nor, under these circumstances, will the acquiescence of the vendees in the delivery of the lumber by the trustees at the shipping point specified in the contract, and its inspection and acceptance by them, estop the vendees from asserting their title to the lumber, where by the terms of the contract of sale, if the vendor failed to deliver the lumber at the shipping point, the vendees were authorized to do so and deduct the expense thereof from the amount due the vendor. Ellis, Etc., Co. *v.* Hubbard, 481.

ASSUMPTION OF RISK. See MASTER AND SERVANT.

ATTORNEY AND CLIENT.

Attorney's Fee.—*Limitation of Attorney's Fee.*—Defendant by a contract dated April 18, 1911, agreed to pay plaintiff in consideration of his professional services in the prosecution of defendant's claim against the government of the United States for property taken by the federal forces during the late civil war, a sum equal to fifty per cent. of the amount which was collected upon said claim. Held: That the contract was void under the omnibus claims act, section 4, 38 Stat. L., p. 996, and this although the services had been rendered by plaintiff and a finding of the court of claims in favor of the claim obtained and a certification thereof to Congress before the omnibus claims act went into effect. Calhoun *v.* Massie, 673.

Claims against United States.—See *infra*, "Attorney's Fee."

AUCTIONS AND AUCTIONEERS.

Stifling Bidding.—See ILLEGAL CONTRACTS.

AUTOMOBILES.

Children.—See *infra*, "Presumption that Pedestrian Will Use Ordinary Care."

Presumption that Pedestrian Will Use Ordinary Care.—The driver of an automoble may have a right to presume that a person of responsible age and apparently in possession of his

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AUTOMOBILES—Continued.

Presumption that Pedestrian Will Use Ordinary Care—Continued.

faculties, will exercise ordinary care for his own protection, and will not negligently or recklesly expose himself to danger. But a driver has no right to indulge such presumption in the case of a child only four years of age. Ratcliffe *v.* McDonald's Adm'r, 781.

AUTREFOIS, ACQUIT AND CONVICT.

Verdict Finding Accused Guilty of Two Offenses.—In the instant case, it was urged that the record did not show for which offense mentioned in the verdict the fine and imprisonment were imposed—the offense of transporting, or that of selling the liquor—and, hence, that the verdict should have been set aside by the trial court, because the accused cannot plead the record in this case as a bar to future prosecution. Held: That the record of said verdict shows that the accused was convicted of both of the offenses last named. Such conviction was in effect an acquittal of all the other offenses charged in the indictment. The plea of *autrefois convict* as to both of the former and the plea of *autrefois acquit* as to all of the latter offenses are made available to the accused by the record in the instant case. Collins *v.* Commonwealth, 815.

AWNINGS. See ABUTTING OWNERS.

BAIL AND RECOGNIZANCE.

Discretion of Court.—See *infra*, "Forfeiture."

Exoneration of Bail.—Bail will generally be exonerated from liability where the performance of the conditions of the recognizance are rendered impossible by (1) the act of God, (2) the act of the law, or (3) the act of the obligee. Bowling *v.* Commonwealth, 340.

Forfeiture.—At common law our courts possessed and in proper cases exercised the power of sparing the recognition before the same was adjudged to be forfeited and to decline to award a *scire facias* thereon. This rule has been extended and enlarged by statute so as to invest the courts with discretionary powers to meet the exigencies of particular cases by remitting the penalty in whole or in part, and rendering judgment on such terms and conditions as it deems reasonable. Code of 1904, section 4099. Bowling *v.* Commonwealth, 340.

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BAIL AND RECOGNIZANCE—Continued.

Forfeiture—Continued.

In the instant case accused was indicted for a felony and entered into a recognizance with plaintiff in error as his surety. Accused failed to appear pursuant to the requirement of his recognizance. The bail was guilty of no negligence whatever, and, without fault on his part, the Commonwealth's attorney, the representative of the State, with full knowledge of the facts, voluntarily suffered the principal to be taken out of the control of his bondsman by federal authority, by which act the latter was rendered powerless to produce the principal at the time and place of trial. Held: That in these circumstances, in the reasonable exercise of its discretionary power under the statute, the circuit court ought to have rendered judgment exonerating the plaintiff in error from liability upon the recognizance. Bowling *v.* Commonwealth, 340.

BAKERS. See LICENSES.

BEST AND SECONDARY EVIDENCE.

Records.—Testimony of witnesses as to suits pending in a sister State, and as to what had been done therein, is inadmissible, as the records of the court are the best evidence as to such matters. Catron *v.* Bostic, 355.

BIDDING.

Stifling Bidding.—See ILLEGAL CONTRACTS.

BILL OF PARTICULARS.

If a declaration gives the defendant partial but not complete notice of the nature and character of the plaintiff's claim, a bill of particulars may be required of the latter. Hunter *v.* Burroughs, 113.

BILLS, NOTES AND CHECKS.

Bona Fide Holder.—*Purchase for Less than Face Value.*—The fact that the purchaser of notes before maturity purchased them for a sum considerably less than their face value, and attempted to get even a greater discount, did not charge the purchaser with knowledge of equities inhering in the notes. Catron *v.* Bostic, 355.

Bona Fide Purchaser.—*Burden of Proof.*—The holding of a purchaser for value, before maturity, is *prima facie bona de,*

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BILLS, NOTES AND CHECKS—Continued.

Bona Fide Purchaser—Continued.

and the burden is on the party denying the *bona fides* of the transaction to prove his case, as the law will not presume fraud. Of course, the evidence may be circumstantial, but the proof of the existing circumstances amounting to implied notice must be clear. Catron *v.* Bostic, 355.

Burden of Proof.—See *infra*, "Bona Fide Purchaser."

BONA FIDE PURCHASER. See BILLS, NOTES AND CHECKS; VENDOR AND PURCHASER.

BONDS.

Common-Law Bonds.—See *infra*, "Statutory Bond as Common-Law Bond."

Refunding Bonds.—See CONSTITUTIONAL LAW.

Statutory Bond as Common-Law Bond.—To be good as statutory bonds, bonds must substantially conform to the statutes authorizing their execution. Unless they do so conform, while they may be good as common-law bonds, they are not valid as statutory bonds. Kiser *v.* Hensley, 536.

BOOKS AS EVIDENCE. See DOCUMENTARY EVIDENCE.

BOUNDARIES.

Burden of Proof.—Defendant was in possession of a lot as defined by an amended plat recorded in the manner provided by law, and his residence occupied a part of the land in dispute when the plaintiff acquired title to the adjoining lot from the defendant's grantor. Held: That the burden was upon the plaintiff to establish the location of the line. Furcron *v.* Gurkin, 93.

In the case at bar, plaintiff's theory was that the line should be made perpendicular with the street upon which the lots faced. His evidence only went far enough to show that this theory could be carried into effect by either of two ways, and afforded no rational ground for adopting the method which would bring the land he sued for within the boundaries of his lot. Held: That this evidence, as a matter of law, was insufficient to sustain a verdict in plaintiff's favor. Furcron *v.* Gurkin, 93.

Construction.—See *infra*, "Plats."

Equity jurisdiction where boundaries are concerned.—Cumbee *v.* Ritter, 448.

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BOUNDARIES—Continued.

Instructions.—*Must Be Based on Evidence.*—See INSTRUCTIONS.

Maps.—See *infra*, "Plats."

Plats.—See *infra*, "Burden of Proof."

If it be conceded that in a proper case the clerk's record of a plat will have to be treated as a verity, this is not so where no question of registry as an element of title is involved, but the decisive question is as to the true subdivision of the property as actually made by the owners. Furcron *v.* Gurkin, 93.

A land company the owner of a tract of land subdivided it into blocks, lots and streets and recorded a plat thereof in the manner provided by law. In this plat the lots fronting on a street approached the same obliquely, and the land company decided that it was desirable to change the plat so as to make the lots perpendicular to the avenue. It, therefore, entered into an agreement with the other parties in interest, which recited that it was the desire of all the parties in interest to make a change in the plat, so as to make the lots perpendicular to the streets on which they fronted. This agreement and the amended plat referred to therein were duly recorded. The plat attached to the agreement, adopted and recorded by the land company, was a complete and accurately defined scheme of subdivision, free from any element of uncertainty or ambiguity. It was an executed, practical and final interpretation of what the land company intended to do, and was expressly declared by the agreement to supercede the original plat and to be binding on all parties. Held: That no room was left for construction, and that it was error for the trial court to permit the jury to consider and construe the agreement along with the plat attached thereto, in determining the true boundary line between two lots, and the recital in the agreement of a desire to make the lots perpendicular became unimportant and immaterial in view of the actual adoption of a plat whose lines are clearly and unmistakably fixed, although not exactly perpendicular. Furcron *v.* Gurkin, 93.

Questions of Law and Fact.—See *infra*, "Plats."

Sufficiency of Evidence.—See *infra*, "Burden of Proof."

BRIDGES. See FERRIES.

Age and Activity of Party Injured.—In an action for injuries against a city occasioned by a fall from a bridge, defendant asked for an instruction that the old age of the plaintiff

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BRIDGES—Continued.

Age and Activity of Party Injured—Continued.

did not relieve him of his duty to use ordinary care in passing along the streets, but if by old age his activity has been impaired, that fact imposes upon him the duty of using greater precaution than he would otherwise have to use. Held: That as there was no evidence in the case tending to show that any want of activity on the part of the plaintiff contributed to the accident, it was not error to refuse the instruction. Even if there had been such evidence it might have been error to have given such instruction, because it was upon the subject of the weight of evidence and singled out and emphasized one circumstance which should have been considered by the jury along with all the other circumstances in the case. That it embodied a correct abstract statement of the law did not make it a proper instruction to the jury. Other instructions in the case left no room for the jury to entertain the view that old age, or anything else, relieved the plaintiff of the duty to exercise ordinary care. City of Charlottesville *v.* Jones, 682.

Contributory Negligence.—See *infra*, "Age and Activity of Party Injured."

Conclusiveness of Verdict of Jury.—See *infra*, "Age and Activity of Party Injured."

Where plaintiff brought his action for injuries sustained by stepping from a bridge at night owing to the absence of a handrail, the determination of the question of whether plaintiff was guilty of contributory negligence in not observing his nearness to the edge of the bridge and the absence of the handrail and in walking off the bridge as he did, depended upon the determination of the controverted question of fact as to what was the condition of light or darkness upon the bridge at the time of the accident. There being a conflict in the testimony on this subject, ordinarily the verdict of the jury would admittedly conclude the question. City of Charlottesville *v.* Jones, 682.

Inattention or Forgetfulness.—An instruction in an action for injuries caused by a fall from a bridge, due to the absence of a handrail, which, in effect, told the jury that there could be no legal excuse for a failure of memory, or for inattention, to a once known fact, would be error. In the instant case it was a question of fact for the jury to determine whether the plaintiff was negligent in his inattention to or forgetfulness of the absence of the handrail, if they believed from the evidence that he had prior knowledge of its absence. City of Charlottesvelle *v.* Jones, 682.

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BRIDGES—Continued.

Contributory Negligence—Continued.

Prior Knowledge of Locality.—In an action for injuries caused by a fall from a bridge, the court instructed that if the jury believed that the injury complained of resulted from a failure of the city to use reasonable care and precaution to keep its bridges and sidewalks in good and sufficient repair, and that the plaintiff sustained damage thereby, whilst exercising such a degree of care and caution as under the circumstances might reasonably be expected from a man of reasonable care and prudence, then plaintiff was entitled to recover. Held: That this instruction was not erroneous in that it allowed the jury to ignore the prior knowledge of the plaintiff of the situation and permitted the plaintiff to recover as if he were in the position of an ideal man exercising reasonable care and prudence, who is referred to in this instruction, although such ideal man may have had no prior knowledge of the situation. The words, "under the circumstances," confined the jury to the consideration of the instant case in which there was no dispute that the plaintiff had prior knowledge of the locality. Whether he had prior knowledge of the defect in the bridge—the absence of the handrail—which rendered the crossing of the bridge in the night time dangerous, was a question for the jury and was or was not one of the "circumstances" in the case as they might find to be the fact. City of Charlottesville *v.* Jones, 682.

Duty of Municipal Corporation.—See *infra*, "Handrail."

It is the duty of a city to use reasonable care to keep and maintain a bridge, which forms part of one of the city streets, in good and sufficient repair to render it reasonably safe for all persons exercising ordinary care and prudence in passing on or over it. City of Charlottesville *v.* Jones, 682.

Establishment.—*Special Road Law of Giles County.*—The special road law for Giles county (Acts 1908, page 611) does not expressly repeal section 944-a, Code of 1904, so far as applicable to the taking of initial action for the establishment and location of new bridges in Giles county by the board of supervisors; nor does it do so by necessary implication; such action of the board of supervisors not undertaking or purporting to extend to the condemnation of land for use for the location of the bridge, or for its approaches, jurisdiction over which matters is conferred on boards of supervisors by said section 944-a as the general law of the State. The latter jurisdiction was taken away from the board of supervisors of Giles county and conferred on the road commission. Snidow *v.* Board of Supervisors, 578.

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BRIDGES—Continued.

Establishment—Continued.

Under the special road law of Giles county (Acts 1908, page 611) and the general statute law of the State as to roads and bridges, the initial determination that a bridge should be established and its location, the determination of the plans and specifications for the bridge and its approaches, the erection of the bridge and its approaches, are left under the jurisdiction of the board of supervisors, subject to the limitation that the erection or supervision of the work of the erection of the bridge and its approaches, must be under the road commissioner, or commissioners, in whose district the work is located, whereas the location of the approaches as they recede from the bridge, the acquisition or condemnation of the right of way for the bridge and its approaches, are transferred to the jurisdiction of the road commission. Snidow *v.* Board of Supervisors, 578.

Handrail.—In the instant case, there had been a handrail on the north side of the bridge for many years, as was known to the plaintiff, but for about three weeks prior to and at the time of the accident, unknown to the plaintiff, such handrail was absent. Held: That the fact that the defendant city allowed the handrail to remain off the bridge for this period, without any excuse being shown therefor, was sufficient evidence to warrant the jury in finding the city guilty of negligent breach of its duty, and the verdict of the jury for the plaintiff, therefore, concluded that question. City of Charlottesville *v.* Jones, 682.

In an action against a city by a pedestrian for injuries sustained from a fall from an unguarded bridge, defendant requested an instruction that if the jury believe that it was obvious to a reasonable man that the rail on the bridge referred to in the evidence was missing then it became the duty of the plaintiff to look out for and guard against the occurrence of any accident to him at that point. The court modified this instruction by inserting the words "if he knew or ought to have known of this" after the word "plaintiff." Held: That these words were properly inserted. City of Charlottesville *v.* Jones, 682.

Inattention or Forgetfulness.—See *infra*, "Contributory Negligence."

Incredible Facts.—But in the case at bar the city invoked against the verdict of the jury the well-established rule that "courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially

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BRIDGES—Continued.

Incredible Facts—Continued.

know to be incredible," and contended that as there was a 500 candle power arc light located at from 100 to 210 feet from the point of the accident behind the plaintiff as he went upon the bridge, that the Supreme Court of Appeals should take judicial notice of the fact that the testimony of the plaintiff was incredible, when he stated that it was so dark that he did not know that he was at the northern edge of the bridge. Held: That the position of the city ignored the facts that the night was damp and cloudy, that plaintiff as he came upon the bridge was faced with a light which shone into his eyes and that the arc light was behind the plaintiff, all of which facts were for the consideration of the jury, and which they, having viewed the scene of the accident under conditions nearly alike those which existed on the night of the accident, were in a better position than the Supreme Court of Appeals to weigh and consider. This was not a case where an admitted fact, or the testimony for a party to the cause, disclosed a physical fact which is irreconcilable with some position taken in another part or parts of such testimony. City of Charlottesville *v.* Jones, 682.

Injury to Pedestrian.—See *infra*, "Age and Activity of Party Injured;" "Contributory Negligence;" "Instructions;" "Proximate Cause."

Instructions.—See *infra*, "Instructions."

Instruction Cured by Other Instruction.—See *infra*, "Instructions."

Instructions.—In an action for injuries sustained by a pedestrian when he fell from a bridge owing to the absence of a handrail, an instruction that the city was "bound to use reasonable care and precaution to keep and maintain its streets, bridges and sidewalks in good and sufficient repair to render them reasonably safe for all persons exercising ordinary care and prudence, passing on or over the same, and if the jury believe from the evidence that the defendant, the city of Charlottesville, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair and that the injury complained of resulted from that cause," they should find for plaintiff, is not defective in the use of the word "all" as descriptive of the "reasonable care and precaution," which the instruction mentions. City of Charlottesville *v.* Jones, 682.

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BRIDGES—Continued.

Instructions—Continued.

In an action against the city for injuries incurred by a pedestrian in a fall from a bridge, an instruction that where a railing on the side of a bridge upon one of the streets of a city is necessary for the safety of travelers, the want of such railing is a defect in the highway for which the city is liable, is not erroneous as imposing upon the city an absolute duty to provide all things necessary for the safety of travelers, where when read together with another instruction there could have been no misconception of it by the jury. City of Charlottesville *v.* Jones, 682.

In an action for injury to a pedestrian who fell from a bridge, an instruction that if the jury believed that the plaintiff had been permanently injured by reason of the accident he had the right to recover prospective as well as past damages, is not erroneous because the scope of the jury's inquiry in ascertaining prospective damages was in no way defined, where another instruction directed that if the jury should find for the plaintiff they might take into consideration any bodily injuries which he might have sustained and any physical pain he might have suffered. City of Charlottesville *v.* Jones, 682.

In an action against a city for injuries sustained from falling from a bridge defendant requested the court to instruct the jury that while the burden of proof of contributory negligence is in general upon the defendant, yet if the plaintiff's evidence discloses his own contributory negligence or it may be inferred from all the circumstances in the case, it bars his recovery no matter where the burden rests. The court modified this instruction and it was claimed by defendant that as modified the instruction failed to tell the jury that contributory negligence barred recovery and left defendant with no *general* instruction on that point. Held: That there was no merit in this contention, as the court gave other instructions, not *general* instructions it is true, but specific instructions having reference to all the evidence in the case on which the defendant relied, or could rely, to show contributory negligence of the plaintiff, and which specifically told the jury that if they found certain facts that the plaintiff was guilty of contributory negligence and could not recover. Hence, the giving of a general and abstract instruction on the subject of contributory negligence was unnecessary. City of Charlottesville *v.* Jones, 682.

Age and Activity of Party Injured.—See *infra*, "Age and Activity of Party Injured."

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BRIDGES—Continued.

Instructions—Continued.

Handrail.—See *infra*, "Handrail."

Inattention or Forgetfulness.—See *infra*, "Negligence."

Instructions Read Together.— See *infra*, "Instructions."

Knowledge of Locality.— See *infra*, "Contributory Negligence."

Municipal Corporations.— See *infra*, "Duty of Municipal Corporation."

Proximate Cause.—In the case at bar, the evidence established that the negligence of the city in not providing a handrail on one side of the bridge was the proximate cause of plaintiff's injury, while plaintiff was not guilty of contributory negligence. City of Charlottesville *v.* Jones, 682.

BURDEN OF PROOF. See PRESUMPTIONS AND BURDEN OF PROOF.

CARRIERS.

Carriers of Passengers.— See CARRIERS OF PASSENGERS.

CARRIERS OF PASSENGERS.

Alighting.—See *infra*, "Duty to Give Reasonable Time for Passenger to Alight."

Contributory Negligence.— See *infra*, "Last Clear Chance."

Plaintiff was an employee of a locomotive works and was accompanying two dead locomotives, new engines, moving on their own wheels as freight, from Richmond, Virginia, to Chicago, Illinois, the two dead engines forming parts of a long through freight train. Upon a stoppage of the freight train, plaintiff hurriedly alighted from his engine immediately next to one of the main line passenger tracks of the company, upon which from his knowledge and experience of twenty years as a locomotive engineer he must have known that trains were likely to pass at any moment, and as to which danger he had been cautioned twice upon that very morning. Plaintiff was struck by a passenger train just as he stepped from his dead engine, or he was struck just before he straightened up, after making an examination of the engine for the purpose of discovering whether it would be necessary because of the hot boxes to take it out of the train. The physical facts showed that plaintiff could not have looked, because if he had he would have seen the rapidly approaching passenger train which injured him. Held: That plaintiff was guilty of such gross negligence that he could not recover. Pennsylvania R. Co. *v.* Jenkins, 211.

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CARRIERS OF PASSENGERS—Continued.

Duty to Give Reasonable Time for Passenger to Alight.—If a passenger is thrown from a car and injured while in the act of alighting by the starting of the car after it has stopped, the carrier is liable for the injuries sustained by the pasenger, whether the movement of the car in starting is violent or not is immaterial. It being unexpected is sufficient to charge the carrier, it being its duty to give reasonable time for the passenger to alight after having stopped the car. Va. R. & P. Co. *v.* Bailey, 250.

Last Clear Chance.—In the instant case, an instruction upon the theory that the doctrine of discovered peril or the last clear chance might be applied by the jury was clearly erroneous, as appears from all of the accounts given of the accident by the plaintiff himself. It is manifest that if he was struck just as he stepped from his engine, there was no opportunity to save him from the consequences of his own negligence. It is equally evident that while a part of his body was across the rail and his head under the engine, a large part, if not all, of his body must have been concealed by the overhang of the tender and freight cars from the engineer of the approaching train on the parallel track, and that when he suddenly got up from under the engine in front of the passenger train by which he was immediately struck there was then no possible chance to save him from the consequences of his own negligence. Pennsylvania R. Co. *v.* Jenkins, 211.

Natural Laws.— Plaintiff's testimony conflicting with natural laws. Va. R. & P. Co. *v.* Bailey, 250.

CEMETERIES.

Exemption from Taxation.— See TAXATION.

CHANCERY. See EQUITY.

CLAIMS. See UNITED STATES.

CLERKS OF COURT.

Probate.— See WILLS.

CLOUD ON TITLE.

Taxation.— *Who May Maintain Suit to Cancel Deed.*—Where the Commonwealth has obtained a good title to land as against its original owner; where the latter or those claiming under him have not redeemed the land, nor any for them; and there

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CLOUD ON TITLE—Continued.

Taxation—Continued.

has been a tax deed, which is void, purporting to convey the title of the Commonwealth to another; the title still remains in the Commonwealth, and the former owner or those claiming the land under him cannot maintain a suit to cancel and remove the deed as a cloud upon the title to the land. The former owner, or anyone claiming under him, should first redeem the land as if the void tax deed had never been executed. Dennis *v.* Robertson. 456.

CODE. See STATUTES.

COMMON-LAW BONDS. See BONDS.

CONDITIONS. See SALES.

Vendor and Purchaser.— See VENDOR AND PURCHASER.

CONFESSIONS.

Admissibility.— See *infra*, "Judicial and Extra-Judicial Confessions."

Corpus Delicti.— The *corpus delicti* cannot be established by the confession of an accused person uncorroborated by other evidence. Collins *v.* Commonwealth, 815.

In the instant case, the *corpus delicti*—the unlawful transportation of the whiskey—was proved by the direct testimony of the officer making the arrest, independently of the admission of the accused that it was his whiskey. Held: That the evidence was sufficient to support the verdict of the jury finding the accused guilty of transporting whiskey contrary to law. Collins *v.* Commonwealth, 815.

Judicial and Extra-Judicial Confessions.—Accused was brought before a justice of the peace upon a warrant charging him with the following offenses, namely, that he did "sell, give away, offer, keep and expose for sale, transport and aid in procuring ardent spirits contrary to law." The justice did not try the accused on the charges in the warrant mentioned, (and indeed had no jurisdiction so to do) but there was testimony that when the accused was brought before the justice, the justice asked the accused what he wanted to do, and the latter said "he wanted to plead guilty to the charge." Held: That the accused's statement that "he wanted to plead guilty to the charge" was not a judicial confession, since it was not before a court competent to try the pending prosecution. Collins *v.* Commonwealth, 815.

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CONFESSIONS—Continued.

Judicial and Extra-Judicial Confessions—Continued.

The statement of accused in the instant case before the justice that "he wanted to plead guilty to the charge," although it could not have been relied on by the Commonwealth as *conclusive* of the guilt of the accused of the offenses charged in the warrant upon which he was brought before the justice of the peace, yet such statement was admissible in evidence as an extra-judicial confession for the consideration of the jury upon the same charges contained in the indictment which were contained in the warrant. Such evidence was not inadmissible merely because insufficient in itself to prove such charges. Collins *v.* Commonwealth, 815.

Sufficiency to Establish Fact.—Evidence as to confessions of parties is intrinsically weak and is inconclusive to establish a fact without the aid of other testimony. Collins *v.* Commonwealth, 815.

Sufficiency to Prove Charge.—In the instant case the statement of the accused before the justice of the peace was in itself alone insufficient evidence of a confession of the offense of transportation of liquor charged in the indictment. In view of the number of the charges in the warrant and the absence of evidence showing that the warrant was ever read to the accused or that he understood at the time he made such statement what all of such charges were, there was an absence of proof that in making such statement the accused intended to say that he wanted to plead guilty to all of such charges, the indication, indeed, from the language the accused used, that he wanted to plead guilty *"to the charge,"* being that he meant to say that he wanted to plead guilty to only one charge. Collins *v.* Commonwealth, 815.

CONFLICTING EVIDENCE. See APPEAL AND ERROR; NEW TRIAL.

CONSTITUTIONAL LAW.

Constitution Not a Grant of Powers.—The Constitution of the State is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit. City of Roanoke *v.* Elliott, 398.

Construction.— See *infra*, "Constitution Not a Grant of Powers."

When the words of Constitutions and of statutes are unambiguous and have a clear and definite meaning, indicating

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CONSTITUTIONAL LAW—Continued.

Construction—Continued.

their purpose, it is well settled that courts are not permitted to interpret that which needs no interpretation, and that general rules for the construction of statutes of doubtful meaning have no application. If the intention is manifest from the language used and leads to no absurd conclusion, courts must give such provisions the effect clearly intended. Hollywood Cemetery Co. *v.* Com., 106.

Construction by Legislature.—Furthermore, in cases of doubt, the construction placed upon the Constitution by the legislature itself is entitled to consideration, but will not be permitted to overturn plain language. City of Roanoke *v.* Elliott, 393.

Delegation of Power by Legislature.—*Act of March 12, 1912.*

The act of March 12, 1912, providing for the presentation to the board of sinking fund commissioners for funding of any bonds, coupons or other obligations on which it is claimed that the Commonwealth of Virginia is liable by reason of having guaranteed the payment of the principal sum or interest, waived the statute of limitations, subject only to the existence of certain facts and circumstances peculiar to the cases that might arise, and the provisions of the statute in this respect are not unconstitutional, as the delegation of legislative and judicial functions to an administrative body, the board of sinking fund commissioners. Stuart's Ex'ors *v.* Sinking Fund Com'rs, 224.

Legislature Delegating Its Powers to Make Law.—The legislature cannot delegate its power to make law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. Stuart's Ex'ors *v.* Sinking Fund Com'rs, 224.

Emergency Clause in Statutes.— See STATUTES.

Exemption from Taxation.— See TAXATION.

Finding of United States Court of Claims.— See *infra*, "Vested Rights."

Jeopardy.— See AUTREFOIS, ACQUIT AND CONVICT.

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CONSTITUTIONAL LAW—Continued.

Judiciary Interfering with Executive Functions.—In trying a case brought by a contractor, claiming a balance due for the construction of a lime grinding plant, under a contract with the Convict Lime Board, the Circuit Court of the city of Richmond was not substituting its discretion and that of the jury for the discretion of the Convict Lime Board, but was merely ascertaining in the method prescribed by statute whether or not, under the contract, there was any debt fairly due by the Commonwealth to the plaintiff. The board had the discretion to discard the machinery and to substitute other machinery therefor. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Necessity of Determination of Constitutionality of Act...If a case can be determined upon other grounds, the constitutionality of a statute will not be drawn in question or passed upon. Watkins *v.* Ford, 268.

Presumption in Favor of Constitutionality.—Every presumption is to be made in favor of the constitutionality of a statute, and it will never be declared to be unconstitutional unless it is plainly and clearly so. If any reasonable doubt exists as to its constitutionality, the act will be upheld. To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it, and the case must be plain indeed before a court will declare a statute null and void. City of Roanoke *v.* Elliott, 393.

Refunding Bonds—Unused Bonds.—The act of March 12, 1912 (Act 1912, page 292), is not invalid becauses it proposes to fund the bonds in question by the use of a part of certain State bonds authorized by the act of February 20, 1892 (Acts 1891-2, page 533), for the settlement of the public debt of Virginia and not funded under previous acts. The funding bonds thus provided for have not as yet been called for or used, and there is no reason why the State may not apply these unused assets to the present purpose. Stuart's Ex'ors *v.* Sinking Fund Com'rs, 224.

Remainders, Reversions and Executory Interests.— See REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS.

Title of Statutes.— See STATUTES.

Vested Rights.—*Finding of United States Court of Claims.*—A finding of the court of claims favorable to a claim against the government of the United States for property taken by federal forces during the late civil war, and the certification

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CONSTITUTIONAL LAW—Continued.

Vested Rights—Continued.

of the same to Congress, though authorized by statute, is not a judgment, and creates no vested rights. Calhoun *v.* Massie, 673.

Where there has been a finding of the court of claims in favor of a claim and a certification thereof to Congress, the government has the same right in law to reject the claim in toto, or to attach conditions to its payment when the act of 1915 (omnibus claims act, section 4, 38 Stat. L., page 996) was passed, as it would have had if there had been no statute authorizing the court of claims to consider and report upon the matter. The condition, therefore, incorporated in the act of 1915 limiting the fees of attorneys or agents for services rendered to twenty per cent. of the amount recovered, was not constitutional. Calhoun *v.* Massie, 673.

CONSTRUCTION. See CONSTITUTIONAL LAW; STATUTES.

Taxation.— See TAXATION.

CONTEMPT.

Enforcement of Decree.—The fact that a decree is final does not render the court powerless to enforce it by contempt proceedings, and such proceedings would not be a procedure *in the cause*, which was ended, but a procedure *beyond* the cause for the enforcement of the decree. Rinehart & Dennis Co. *v.* McArthur, 556.

Final Judgments and Decrees.— See FINAL JUDGMENTS AND DECREES.

Public Officers.—Where money is in the hands of an officer of the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer. Rinehart & Dennis Co. *v.* McArthur, 556.

CONTRACTS.

Assignments.—See ASSIGNMENTS.

Illegal Contracts.— See ILLEGAL CONTRACTS.

Implied Contracts.— See IMPLIED CONTRACTS.

Joint Adventures.— See JOINT ADVENTURES.

Merger.— See MERGER.

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CONTRACTS—Continued.

Orders.—See ORDERS.

Sales.—See SALES.

Specific Performance.—See SPECIFIC PERFORMANCE.

State.—See STATE.

Trees and Timber.—See TREES AND TIMBER.

Vendor and Purchaser.—See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

Bridges.—See BRIDGES.

Carriers of Passengers.—See CARRIERS OF PASSENGERS.

Death by Wrongful Act.—See DEATH BY WRONGFUL ACT.

Inattention or Forgetfulness.—See NEGLIGENCE.

CONVICTS. See PRISONS AND PRISONERS.

CORPORATIONS.

Charter.—See *infra*, "Forfeiture of Charter."

Construction against Forfeiture.—See *infra*, "Waiver of Forfeiture—Construction against Forfeiture."

Estoppel.—The failure of the Commonwealth to annually assess a corporation with the registration fee imposed by law and to require the report of the status, business or condition of the corporation annually for a number of years, will not estop the Commonwealth from making the assessment and requiring the report. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Forfeiture of Charter.—See PENALTIES AND FORFEITURES.

See *infra*, "Presumption in Favor of Continued Existence and against Forfeiture of Charter," "Registration Fee," "Report," "Waiver of Forfeiture—Construction against Forfeiture."

Section 157 of the Constitution.—The object of section 157 of the Constitution of 1902 is not the forfeiture of the charter of any corporation, but the collection by the Commonwealth from every corporation of an annual registration fee and the requirement from it of an annual report "of the status, business or condition of such corporation." The revocation and annulment of the charter of such corporation is merely a penalty which the Constitution provides shall be

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CORPORATIONS—Continued.

Forfeiture of Charter—Continued.

Section 157 of the Constitution—Continued.

imposed for the failure of a corporation to pay its annual registration fee or to make its said annual reports. Elliott's Knob I., Etc., *v.* Corp. Com., 63.

Section 157 of the Constitution of 1902—Tax Bill 1903.—In the case at bar the corporation contended that under the tax bill of 1903 its charter was forfeited for its failure, for the period designated in the Constitution (section 157) and in such statute, to make the report of "the amount of its maximum capital stock as of the first day of January" of 1904. It is true that the tax bill of 1903 did require such a report; but that statute, as is apparent from an examination of it, did not provide the penalty of forfeiture for any failure to make such report. It was from the failure to make report of "its status, business or condition as the State Corporation Commission shall require," from which the forfeiture was to ensue, and not from the failure to make the report of the amount of its maximum capital stock. Elliot's Knob I., Etc., Co. *v.* Corp. Com., 63.

Whether Section 157 of the Constitution of 1902 is Self-Executory.—The provision in section 157 of the Constitution of 1902 imposing annual regulation fees upon corporations and requiring annual reports from corporations, is not self-executory. The Constitution leaves it discretionary with the legislature to provide reasonable regulations with respect to how and when such annual registration fee should be assessed and with respect to how and when such fees should become due and payable, and with respect to the making of the annual reports. And in view of the "general laws" in fact enacted by the legislature (Acts 1902-3-4, page 137, sections 45, 48, tax bills 1903, 1906, section 41), it follows that the constitutional provision must be construed to mean that it did not impose the penalty of the "revocation and annullment of the charter" of a corporation until there was an assessment of its annual registration fee as provided in such "general laws," and it had thus become due and payable and there was thereafter the "failure" or default specified in the Constitution to pay such fee, *or* until there was the report required of it by the State Corporation Commission in accordance with such "general laws" and there was thereafter the "failure" or default specified in the Constitution to make such report. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

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CORPORATIONS—Continued.

Penalties and Forfeitures.—See PENALTIES AND FORFEITURES.

Presumption in Favor of Continued Existence and against Forfeiture of Charter.—Every presumption is in favor of the continued existence and against the conclusion that the charter of a corporation has been forfeited. Hence, the courts are always disinclined to hold that the charter of a corporation has been forfeited. This is especially true where the Commonwealth is not claiming that a forfeiture has occurred, but the contrary, and no third person is so claiming; for the forfeiture of corporate franchises can be effected only by the State or private persons under statutory authority. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Registration Fee.—See *infra*, "Forfeiture of Charter."

Estoppel.—See *infra*, "Estoppel."

Necessity of Assessment.—The State Constitution, by self-executing ordinance, or the legislature, by self-executing statute, unless prohibited by the State Constitution, might have made a declaration of forfeiture of the charters of corporations upon their mere failure, for a specified time, to pay their annual registration fees or to make their reports of status, business or condition, independently of any attendant or preliminary steps in procedure with respect to these matters having been taken or not taken by the State through its governmental agency, the State Corporation Commission, this was not done by the provisions of the Constitution of 1902, section 157; sections 45 and 48, Acts 1902-3-4, page 137, tax bills, 1903, 1906, section 41. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Section 157 of the Constitution of 1902 did not itself impose the tax (the annual registration fee), but left with the legislature the duty to impose it. Consequently, the authority inherent in the legislature to prescribe the method or system of such taxation was not taken away from it by the Constitution. The method or system adopted by the legislature for imposing such tax was to provide for an assessment of it by the State Corporation Commission. Under well established rules concerning taxation, such tax could not be considered as imposed or as having become due and payable until there was an assessment of it by the State Corporation Commission. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Where the legislature has prescribed a method or system of taxation which includes the requirement of an assessment,

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CORPORATIONS—Continued.

Necessity of Assessment—Continued.

all the steps in the procedure of the assessment required by the statute must be taken before the tax can be considered as having been imposed and as having become due and payable. And it is immaterial which process of the assessment is concerned, the listing or the valuation for taxation, if an assessment is included in the system or method of taxation prescribed. It is equally immaterial whether the valuation includes the exercise of judicial judgment as to the value of property or is a mere ascertainment of facts and application thereto of a scale of taxation fixed by statute. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 68.

Report.—See *infra*, "Forfeiture of Charter."

Estoppel.—See *infra*, "Estoppel."

Failure to Make as Ground for Forfeiture.—Under section 157 of the Constitution of 1902 and the tax bills of 1903 and 1906, section 41, the report, the failure of making of which is one ground of forfeiture, is a "report of the status, business and condition" of the corporation. As to such report it is manifest from both the statute as contained in the tax bills of 1903 and 1906 and from section 157 of the Constitution, that a discretion was vested in the State Corporation Commission as to the form of it and as to what details it should cover; and no default in making such report occurs until such a report is required of the corporation by affirmative action of the State Corporation Commission by forwarding forms for such report to the corporation. Elliott's Knob I., Etc., Co. *v.* Corp. Com. 63.

Waiver of Forfeiture—Construction against Forfeiture.—However clear the right of the State to forfeit the franchise of a corporation, it may waive such right. Unless, indeed, it is forbidden to do so by the State Constitution. And in the construction of the Constitution, it must be strictly construed against the result of a forfeiture of the charter of a corporation. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 68.

COSTS.

Moot Cases.—It was insisted by counsel for the appellant that in the instant case the controversy ought to be decided in order to settle the question of costs. Held: That the controversy in the case at bar having ceased to exist, leaving

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COSTS—Continued.

Moot Cases—Continued.

only moot questions, there could be no recovery for costs in the Supreme Court of Appeals, where such a judgment depends upon the substantial result of the litigation, and that the case must, therefore, be dismissed without costs to either party. Branscome *v.* Cunduff, 352.

COUNTIES.

Highways.—See STREETS AND HIGHWAYS.

COURTS.

Conflict of Jurisdiction between State and United States Courts.—See UNITED STATES.

Judicial Sales.—See JUDICIAL SALES.

Judicial Interfering with Executive Functions.—See CONSTITUTIONAL LAW.

United States Court of Claims.—See UNITED STATES.

United States Courts.—See UNITED STATES.

CREDITORS' SUITS.

Executors and Administrators.—See *infra*, "Parties."

Where a bill is filed by a creditor of a decedent's estate, suing on his own behalf only, and the court orders an account of debts to be taken in the case, it becomes a creditor's bill upon the entry of the order, and the complainant loses his dominion over the suit. Catron *v.* Bostic, 355.

Guardian Ad Litem.—See *infra*, "Infants."

Infants.—Where infants were entitled to a share in a decedent's estate, and in the prayer of a bill by a creditor to subject the real estate of the decedent to his debts, it was asked that a guardian *ad litem* be appointed, but no names were given, no process was served on them, no guardian *ad litem* appointed, and no answer filed by or for them, their interests are unaffected by any proceedings in the cause. Catron *v.* Bostic, 355.

Parties.—If a bill be filed by a general creditor of a decedent for the purpose of subjecting his real as well as his personal estate, not only are the heirs necessary parties defendants, but the personal representative also. Catron *v.* Bostic, 355.

In the case at bar, the complainant was the personal rep-

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CREDITORS SUITS—Continued.

Parties—Continued,

resentative of the decedent, but he was not brought before the court in that capacity. The widow of the decedent was entitled to dower in his real estate, and she and the decedent constituted a partnership, whose assets were sought to be subjected in the suit. She was, therefore, a necessary party as such surviving partner, and also in her individual capacity, as the bill asked for a sale of the land of which she was to be endowed. Catron *v.* Bostic, 355.

In a creditor's suit brought by one creditor, it is not necessary that all the other creditors be served with process, as such creditors are not necessary parties. Catron *v.* Bostic, 355.

Unsecured Debts.—Real estate of a debtor cannot be sold to pay his unsecured debts. A court of equity has no such power. Catron *v.* Bostic, 355.

CRIMINAL LAW.

Autrefois, Acquit and Convict.—See AUTREFOIS, ACQUIT AND CONVICT.

Confessions.—See CONFESSIONS.

Homicide.—See HOMICIDE.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Presumptions and Burden of Proof.—See PRESUMPTIONS AND BURDEN OF PROOF.

Reasonable Doubt.—See REASONABLE DOUBT.

CURTILAGE. See INTOXICATING LIQUORS.

DAMAGES.

Death by Wrongful Act.—See DEATH BY WRONGFUL ACT.

Instructions.—In an action against a master for injuries to a servant, an instruction that the plaintiff might recover "all damages which the evidence shows she has sustained," is objectionable where the previous clauses of the instruction had fully covered her mental and physical pain, pecuniary loss and every element of damage claimed in the declaration. Dreyfus & Co. *v.* Wooters, 42.

Master and Servant.—See MASTER AND SERVANT.

In an action against a master for injuries to a servant, an instruction that the plaintiff might recover "all damages

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DAMAGES—Continued.

Master and Servant—Continued.

which the evidence shows she has sustained," is objectionable where the previous clauses of the instruction had fully covered her mental and physical pain, pecuniary loss and every element of damage claimed in the declaration. Dreyfus & Co. *v.* Wooters, 42.

Medical Expenses.—*Injury to Servant.*—Dreyfus & Co. *v.* Wooters, 42.

SALES. See SALES.

DAMNUM ABSQUE INJURIA.

Pollution of watercourse by municipal corporation. Darling *v.* City of Newport News, 14.

DEATH BY WRONGFUL ACT.

Contributory Negligence.—In the instant case a proceeding by motion to recover damages for the negligent killing of plaintiff's intestate, a child about four years of age, there was evidence tending to show that the negligence of plaintiff proximately contributed to the accident and under the statute of distributions the recovery would inure to his benefit. Held: That it is settled law in this jurisdiction that in such a case plaintiff could not recover. Ratcliffe *v.* McDonald's Adm'r, 781.

Damages.—See *infra*, "Measure of Damages."

Husband and Wife.—Section 2286-a of the Code of 1904 provides as follows: "A married woman may contract and be contracted with, sue * * * in the same manner and with the consequences as if she were unmarried, whether the right or liability asserted by * * * her, shall have accrued before or after the passage of this act." Held: That this statute has not conferred upon a married woman a right of action against her husband for damages for an assault upon her committed by the husband during the coverture. It follows, therefore, that the personal representative of a wife, who was killed by her husband when the husband and wife were living together in that relationship, has no right of action against the husband or his personal representative for the death of the wife. Keister's Adm'r *v.* Keister's Ex'ors, 157.

The portion of the act quoted in the preceding headnote had reference only to the remedies thereby given to a mar-

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DEATH BY WRONGFUL ACT—Continued.

Husband and Wife—Continued.

ried woman. It merely provides that at all times during the coverture a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary to give rise to such cause of action, and does not confer the substantive right necessary to support the right of a married woman to sue her husband for an assault upon her committed by him during the coverture. **Keister's** Adm'r *v.* Keister's Ex'ors, 157.

Measure of Damages.—Code of 1904, section 2903, provides that "the jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars." No other restriction is placed upon the jury, and it was intended to leave the jury to fix the damages at such sum as the evidence in the particular case seemed to indicate was "fair and just," not exceeding $10,000, and an instruction given in language frequently approved by the Supreme Court of Appeals and intended simply as an aid to the jury in arriving at a verdict in accordance with the provisions of the statute, is not erroneous. **Ratcliffe** *v.* McDonald's Adm'r, 781.

Accordingly, in the instant case, it was not error to instruct the jury that in ascertaining the damages that the plaintiff is entitled to recover, they should find the same with reference: "First: To the pecuniary loss sustained by the father and mother of the deceased, and the (6) one brother and five sisters of the deceased, fixing such sums as would be equal to the probable earnings of the deceased child, taking into consideration his age, intelligence, and health, during what would have been his lifetime, if he had not been killed. Second: In ascertaining the probability of life of the deceased, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third: By adding thereto compensation for the loss of his care, attention and society to his father and mother, and his brother and sisters. Fourth: By adding such further sum as they may deem fair and just by way of solace and comfort to his father and mother, and brothers and sisters, for the sorrow, suffering and mental anguish occasioned to them by his death." **Ratcliffe** *v.* McDonald's Adm'r, 781.

Parent and Child.—See *infra*, "Contributory Negligence."

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DEBTS.

Mandamus.—See MANDAMUS.

DECLARATION. See PLEADING.

DEEDS.

Boundaries.—See BOUNDARIES.

Description of Land.—Where under a contract of sale, the vendors tendered a deed containing the same description of the land as that contained in the contract of sale and in every deed previously conveying the land, and the land could be readily and adequately identified from the description given, the vendees could not refuse to receive the deed on the ground that the description of the land was insufficint, in that it did not show the number of feet or chains on the boundaries, and demand a survey and plat to be made a part of the deed. Wolford *v.* Jackson, 280.

Drains and Sewers.—See DRAINS AND SEWERS.

Easements.—See DRAINS AND SEWERS.

Execution by Vendors.—The mere fact that the contract of sale stipulated that the vendors would execute and deliver, or cause to be executed and delivered, a deed with covenants of general warranty, would not release the vendors from their personal obligation to unite in the conveyance and covenants. Unless the contract expressly provides that the deed shall be made by a third person, it must be made by the vendor himself. Wolford *v.* Jackson, 280.

In the case at bar, however, the complainants stated in their bill that they have at all times been ready, willing and able to comply with the terms of their agreement, and that the holding company was willing and able to convey the land to the defendants upon their compliance with the terms of the contract; and the bill contains the usual prayer for general relief. Therefore, it was entirely competent for the court, with all the parties before it, and in pursuance of the prayer for general relief, to require the vendors to unite with the holding company in a deed conveying the land to the defendants with covenants of general warranty of title. Wolford *v.* Jackson, 280.

Merger.—See MERGER.

Plats.—See BOUNDARIES.

Specific Performance.—See SPECIFIC PERFORMANCE.

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DEEDS—Continued.

Sufficiency.—See *infra*, "Execution by Vendors."

Tax Deed.—See TAXATION.

DEFAULT.

Publication.—See SERVICE OF PROCESS.

DEMURRERS.

Appeal and Error.—*Specifically Stating Grounds of Demurrer.*—Where the objections on demurrer to certain counts in the declaration do not appear from the record to have been made in the court below by being specifically stated in the grounds of demurrer, but it does not appear from the record that any motion was there made by the plaintiff to require or that the court on its own motion required the grounds of demurrer relied on to be stated (section 3271, Code of 1904), and no objection is made by the plaintiff to the consideration of the assignments of error by the Supreme Court of Appeals, such assignments will be considered by that court. Hunter *v.* Burroughs, 113.

Grounds of Demurrer.—See *infra*, "Appeal and Error."

Grounds of demurrer need not be stated unless required by some party to the cause or by the court. Catron *v.* Bostic, 355.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Motion.—See *infra*, "Notice of Motion."

Notice of Motion.—In the instant case, a motion for judgment to recover damages for the death of plaintiff's intestate, there was no motion to quash the notice of motion, but counsel for defendants merely stated in the grounds of defense that the notice "does not in law sufficiently state a case; hence subject to demurrer." To say that a pleading is subject to demurrer, even in a proceeding by motion, cannot be said to constitute a demurrer to such pleading. Ratcliffe *v.* McDonald's Adm'r, 781.

DEMURRER TO EVIDENCE.

Appeal and Error.—See APPEAL AND ERROR.

DEVISAVIT VEL NON. See WILLS.

DIRECTING VERDICT. See VERDICT.

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DISCOVERY.

Double Office of Answer.—An answer in cases where relief is sought, properly consists of two parts; and in fact performs a double office. It consists, first, of the defense of the defendant to the case made by the bill; and, secondly, of the examination of the defendant on oath, as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually addressed. Johnson *v.* Mundy, 730.

Extent of.—Except in a case of a mixed bill of discovery, as to which a different rule prevails, it has been long well settled, as the result of the development of equity jurisdiction, that a plaintiff in equity is not confined in his right to discovery to cases where he cannot otherwise prove the facts sought to be supplied in evidence by means of discovery, but he may require this discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense. Johnson *v.* Mundy, 730.

Jurisdiction of Equity.—Except in cases of mixed bills of discovery, where the statute law on the subject does not expressly abrogate the jurisdiction of courts of equity to compel discovery (and the statute law in Virginia does not), that jurisdiction still exists. Johnson *v.* Mundy, 730.

Object of.—The immediate object of discovery in all bills in equity was, in its origin, and still is, *not to obtain relief*, but *evidence*. The discovery enables one party to search the conscience of his antagonist and to compel him to make disclosures upon oath of facts necessary to the preservation of the rights of the former, which he otherwise might not be able to prove. Johnson *v.* Mundy, 730.

Waiver of Answer under Oath.—If a plaintiff, in a bill for equitable relief (which the court has jurisdiction to give independent of discovery), prays for certain disclosures of fact by the defendants, in aid of such equitable relief, but waives answer under oath, the plaintiff cannot except to the answer as insufficient because the respondents, although answering fully as to all other portions of the bill, fail to make the discovery asked for. In the absence of statute, or some rule of court authorizing it, there can be no discovery compelled by a bill waiving answer under oath, and section 3281 of the Code of 1904 has not changed this established rule of proceedure in chancery. Johnson *v.* Mundy, 730.

An answer not under oath is not free from all exception for insufficiency. But the requirements of modern equity

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DISCOVERY—Continued.

Waiver of Answer under Oath—Continued.

procedure as to affirmative statements of defense in an answer, when considered merely as a pleading, does not lead to the result of allowing a plaintiff to compel a respondent to go beyond traversing each and all of the material allegations of the bill and giving an affirmative statement of facts constituting his own defense, and compel him to also add a statement of facts not a part of his defense, but a part of the plaintiff's case, and which the plaintiff needs and seeks *as evidence* to support his case. Johnson *v.* Mundy, 730.

In the instant case where complainant waived an answer under oath, the defendants having answered fully all of the allegations of the bill, except the interrogatory, they could properly refrain from answering further, and this notwithstanding the general rule that having answered defendant must answer fully. Johnson *v.* Mundy, 730.

DISMISSAL, DISCONTINUANCE AND NONSUIT.

Equity.—Whenever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity is the want of jurisdiction in such case, and though the defendant took no notice of the defect but defended on the merits, and the case was heard and decided on the merits, the Supreme Court of Appeals will reverse and dismiss where there is such lack of jurisdiction. Catron *v.* Bostic, 355.

DIVORCE.

Appeal and Error.—See APPEAL AND ERROR.

DOCUMENTARY EVIDENCE.

Books as Evidence.—*Admissibility.*—Entries in books, in order to be admissible, ordinarily must have been made in the regular course of business and as a part of the party's system of keeping his accounts. The fact that the entries are made by clerks in the regular routine of their employment, and under the natural impulse of an employee to perform his duties accurately, is the safeguard of the accuracy of the entry. Indeed, under the systems of bookkeeping in modern business houses, the mechanical precision with

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DOCUMENTARY EVIDENCE—Continued.

Books as Evidence—Continued.

which numerous employees record various transactions, together with the absence of any personal motive to misrepresent the facts of the transaction, makes the modern book of accounts a very high form of evidence in respect of transactions that are the proper subject matter for a book of account. Buchanan, Adm'r, *v.* Higginbotham, 662.

Cash Payments.—Books of account of banks and bankers are admissible to prove cash advances, loans and other cash items, and this rule has been frequently extended to others where the entries in respect to cash transactions are made in the regular course of business and not merely as casual transactions foreign to the general character of the business conducted by him. The loan or payment of small sums may be proved by books, upon the ground that they are not within the reason of the general rule, that large cash transactions, out of the ordinary course of business cannot be thus proved. Buchanan, Adm'r, *v.* Higginbotham, 662.

In the instant case, the relatively small payments of cash in question, some of them being apparently in settlement of accruing rent, in accordance with the previous custom of the parties, come within the exception to the general rule that cash payments cannot be proved by book accounts. Buchanan, Adm'r *v.* Higginbotham, 662.

Maps.—See BOUNDARIES.

Plats.—See BOUNDARIES.

Witness Refreshing His Memory.—Where a witness, who had made certain written reports was upon the witness stand with the reports in his hand, refreshed his memory from time to time therefrom, and might have testified, and indeed did testify, as to every fact therein contained which was deemed pertinent by either of the parties, it was not error to exclude the reports themselves. Stuart, Gov., *v.* Smith-Courtney Co., 231.

DOMICILE.

Foreign Corporations.—Union Tanning Co. *v.* Commonwealth, 610.

DRAINS AND SEWERS.

Appurtenant or in Gross.—See *infra*, "Construction of Deed."

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DRAINS AND SEWERS—Continued.

Construction of Deed.—A deed conveying part of a tract of land (consisting of 47.5 acres) provided that the grantee should have a right to construct a sewer through the property of the grantor. The deed contemplated the use of the easement not only for the drainage of the 47.5 acres conveyed, but also as essential to the drainage of an incorporated town, and other lands not included in that particular tract. Held: That the easement was not appurtenant to the 47.5 acres conveyed by the deed. It was either an easement in gross or else extends the area of the land to which it is appurtenant, so as, at least, to include land naturally drained by the channel. If it is to be regarded as an easement in gross, it is still "an interest in land," and, therefore, may be disposed of by deed or will under the statutes of this State. Code 1904, sections 2418, 2548. City of Richmond *v.* Richmond S. & G. Co., 1.

Deeds.—See *infra*, "Construction of Deed."

Nuisances.—See NUISANCES.

Pollution of Watercourse.—See WATERS AND WATERCOURSES.

EASEMENTS.

Apurtenant or in Gross.—See DRAINS AND SEWERS.

Drains and Sewers.—See DRAINS AND SEWERS.

Mills.—See MILLS AND MILLDAMS.

EJUSDEM GENERIS. See STATUTES.

ELECTIONS.

Clerk.—*Refusal by Clerk to Issue Certificate of Election.*—See *infra*, "Contest."

Commissioners of Election.—*Notice of Meeting.*—No notice of the time and place of a meeting of the commissioners of election to canvass the returns is required, but they must meet in public. Gregory *v.* Hubard, 510.

Presence of All Commissioners.—Section 1022 of the Code of 1904 provides that the judge of election and the registrar appointed by the county board "shall also act as commissioners of election." It is not necessary, under section 133 of the Code of 1904, that all of the commissioners of election should be present when the vote is canvassed. It is sufficient if three be present, and in the case at bar three were

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ELECTION—Continued.

Commissioners of Election—Continued.

Presence of All Commissioners—Continued.

present, and the tie vote for mayor was broken in the manner prescribed by section 135 of the Code of 1904. Gregory *v.* Hubard, 510.

Public Place.—A meeting of election commissioners held in the clerk's office is held in a public place, and it was none the less public because no one was present except the commissioners, the deputy clerk and counsel for the person elected. Gregory *v.* Hubard, 510.

Time of Canvass of Returns.—The statute (Code 1904, section 133) requiring the commissioners of election to canvass the returns on the second day after the election is only directory as to the time of canvass, and if they let the time elapse without making the canvass, the successful candidate is not thereby deprived of the benefit of the election, as the commissioners could thereafter canvass the returns, and if they failed to do so, could be compelled to make the canvass. Gregory *v.* Hubard, 510.

Contest.— *Refusal of Clerk to Issue Certificate of Election.*—In a proceeding by mandamus to compel a county clerk to issue a certificate of election as mayor to the petitioner, there was no allegation that the election was not fairly held, except the statement of the clerk that one person was allowed to register and vote on the day of election (which might be a ground for contesting the election, but not for the clerk to refuse a certificate), and his further statement as to his refusal to permit the commissioners to canvass the returns and their subsequent canvass before his deputy while the clerk was sick. Held: These were not good reasons for refusing the certificate, and the clerk could not in this manner annull the election. Gregory *v.* Hubard, 510.

Mandamus.— *Certificates of Election.*—Under section 137 of the Code of 1904, it was the plain duty of the county clerk to immediately make out a certificate of election to petitioner, in the case at bar, as mayor of the town of Dillwyn, and deliver the same to him, and on request of petitioner therefor, the clerk having failed and refused to do so without good cause, the writ of mandamus prayed for by petitioner should be awarded. Gregory *v.* Hubard, 510.

Notice of Meeting.— See *infra*, "Commissioners of Election."

Public Place.— See *infra*, "Commissioners of Election."

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ELECTIONS—Continued.

Time of Canvass of Returns.—See *infra*, "Commissioners of Election."

ELECTRICITY.

Master and Servant.—If a servant, an experienced lineman, working about highly charged wires of the defendant daily and knowing how to handle them, was ordered by his foreman to kill a wire, without any assurance whether the current was on or off, he could not recover where he took hold of the wire with his naked hand and was injured. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Servant relying on vice-principal's statement that current had been cut off. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

EMINENT DOMAIN.

Ferries.— See FERRIES.

Streets and Highways.—See STREETS AND HIGHWAYS.

EQUITY.

Answer.— See ANSWERS.

Creditors' Suits.— See CREDITOR'S SUITS.

Discovery.— See DISCOVERY.

Dismissal, Dincontinuance and Nonsuit.—Whenever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity is the want of jurisdiction in such case, and though the defendant took no notice of the defect but defended on the merits, and the case was heard and decided on the merits, Supreme Court of Appeals will reverse and dismiss where there is such lack of jurisdiction. Catron *v.* Bostic, 355.

Issues to Jury.—See ISSUES TO JURY.

Judicial Sales.— See JUDICIAL SALES.

Jurisdiction.— See JURISDICTION.

Lost Instruments and Records.— See LOST INSTRUMENTS AND RECORDS.

Multifariousness.— See MULTIFARIOUSNESS.

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EQUITY—Continued.

Real Property.—Jurisdiction of equity where title and boundary of land are concerned. Cumbee *v.* Ritter, 448.

Specific Performance.—See SPECIFIC PERFORMANCE.

Trespass.—The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. But where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever, indeed the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury. Cumbee *v.* Ritter, 448.

ESTOPPEL.

Assignments for the Benefit of Creditors.—The vendor of lumber made an assignment for the benefit of his creditors and included in the assignment "all the remainder of the purchase price due" from the vendees. Under the contract of sale title to the lumber had passed to the vendees. Held: That the acquiescence of the vendees in the assignment did not estop them from asserting title to the lumber, or any right of set-off against the purchase money for such lumber by reason of any advances or loans made by them to the vendor of the lumber under the contract. Ellis, Etc., Co. *v.* Hubbard, 481.

Title to Lumber Sold.—Nor, under these circumstances, will the acquiescence of the vendees in the delivery of the lumber by the trustees at the shipping point specified in the contract, and its inspection and acceptance by them, estop the vendees from asserting their title to the lumber, where by the terms of the contract of sale, if the vendor failed to deliver the lumber at the shipping point, the vendees were authorized to do so and deduct the expense thereof from the amount due the vendor. Ellis, Etc., Co. *v.* Hubbard, 481.

Corporations.—See CORPORATIONS.

Garnishment.—*Answer in Garnishment Proceedings.*—The answer of vendees in garnishment proceedings admitting a balance of indebtedness under the contract of sale to the vendor is not inconsistent with vendees' claim of title to the lumber itself under the contract of sale or their right to

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ESTOPPEL—Continued.

Garnishment—Continued.

charge the vendor with any advances or loans the vendees may have made to him under the contract of sale or otherwise. Ellis, Etc., Co. *v.* Hubbard, 481.

Judicial Sales.—See JUDICIAL SALES.

Nuisances.—See NUISANCES.

EVIDENCE.

Best and Secondary Evidence.—See BEST AND SECONDARY EVIDENCE.

Books as Evidence.—See DOCUMENTARY EVIDENCE.

Confessions.—See CONFESSIONS.

Conflicting Evidence.—See APPEAL AND ERROR.

Criminal Law.—See REASONABLE DOUBT.

Documentary Evidence.—See DOCUMENTARY EVIDENCE.

Exclusion of Evidence.—See APPEAL AND ERROR; ASSIGNMENT OF ERRORS.

Expert and Opinion Evidence.—See EXPERT AND OPINION EVIDENCE.

Homicide.—See HOMICIDE.

Hypothetical Question.—See SALES.

Impossible Physical Facts.—*Conflict Between the Evidence and Impossible Physical Facts.*—City of Charlottesville *v.* Jones, 682; Va. R. and P. Co. *v.* Bailey, 250.

Instructions.—See INSTRUCTIONS.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Malpractice.—See PHYSICIANS AND SURGEONS.

Natural Laws.—*Plaintiff's Testimony Conflicting With Natural Laws.*—Va. R. & P. Co. *v.* Bailey, 250; City of Charlottesville *v.* Jones, 682.

Order of Proof.—See ORDER OF PROOF.

Secondary Evidence.—See BEST AND SECONDARY EVIDENCE.

Striking out Evidence.—*Failure to Connect Defendant With Acts Introduced.*—In an action for destroying a building to prevent the spread of fire, the court permitted the introdustion of evidence as to the acts and conduct of defendant's

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EVIDENCE—Continued.

Striking out Evidence—Continued.

uniformed policemen, upon the understanding that it should later be made to appear that these persons were acting as agents and employees of the defendant, and within the scope of their employment. This the plaintiff failed to do. Held: That it was not error for the court to strike out the evidence referring to the acts and conduct of the police officers. Fardis *v.* E. I. DuPont, Etc., Co. 88.

Where in addition to instructing the jury to disregard all evidence introduced as to the acts or statements of the police in defendant's uniform, the court further directed them to disregard all evidence with reference to the destruction of the building, no prejudice resulted to the plaintiff. It would told the jury to disregfficient for the court to have simply propably have been suard any evidence as to the conduct and statements of the policemen, but the exclusion of that evidence ended the case so far as the defendant was concerned. Fardis *v.* E. I. DuPont, Etc., Co. 88.

Variance.—See VARIANCE.

Vendor and Purchaser.—See VENDOR AND PURCHASER.

EXCEPTIONS AND OBJECTIONS. See APPEAL AND ERROR.

Objection Not Raised Below.—See APPEAL AND ERROR.

Objections Ex Mero Motu.—Where the trial court has jurisdiction of the subject matter, objection to a mandamus, if available, cannot be noticed by the court *ex mero motu.* Rinehart & Dennis Co. *v.* McArthur, 556.

EXECUTORS AND ADMINISTRATORS.

Creditors' Suits.—See CREDITORS' SUITS.

Debts of Decedent.—See *infra*, "Sale of Realty."

Proof of Indebtedness to Estate.—*Duty of Executor.*—Where a cause was referred to a commissioner, who took the evidence submitted and reported in favor of the complainant, it was the duty of the defendant, the personal representative of a decedent, if he knew of any evidence to sustain his allegations of indebtedness by complainant to the decedent, or to discredit the account of the complainant, to produce it before the commissioner for consideration, or at least to give the names of the witnesses to the commissioner, so that they might be summoned. Only one inference can be drawn from his failure to do so, and that inference is that no

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EXECUTORS AND ADMINISTRATORS—Continued.

Proof of Indebtedness to Estate—Continued.

such evidence exists. The criticism that the commissioner did not seek such testimony is not justified. **Buchanan**, Adm'r *v.* Higginbotham, 662.

Sale of Realty.—*Suit by Administrator.*—A bill charging that the personal estate of a decedent was insufficient to pay the decedent's debts, and praying for a sale of the real estate or so much thereof as might be necessary to pay the debts, cannot be maintained by an administrator. **Catron** *v.* Bostic, 355.

The administrator has nothing to do with the land, except to collect the rents accrued during the lifetime of the decedent, and he has no capacity to bring a suit to sell it. His concern is solely with the personal estate which it is his duty to administer. If that is not sufficient to pay the debts of the intestate, it is no concern of his admistrator. The creditors have their remedy against the heirs to subject the real estate which is made assets for the payment of their debts by section 2665 of the Code of 1904, but the administrator has no such right. The real assets are not subject to be administered at the suit of the administrator of an intestate, in the absence of a statute conferring such right. In this State, the right to subject the real assets is expressly given to the creditor. It is not extended to the administrator of the intestate. Code of 1904, section 2668; Catron *v.* Bostic, 355.

EXEMPLARY DAMAGES.

Malicious Prosecution.—In view of the evidence in the instant case an instruction that the jury if they believe that the acts complained of were committed with actual malice and a design to injure or oppress the plaintiff, might assess punitive or exemplary damages, was not erroneous. **Clinchfield** Coal Corp. *v.* Redd, 420.

EXEMPTION FROM TAXATION. See TAXATION.

EXONERATION OF BAIL. See BAIL AND RECOGNIZANCE.

EXPERT AND OPINION EVIDENCE.

General Effects of an Ailment.—Where a physician had testified that the plaintiff had a chronic case of brachial neuritis, there is no legal objection to having him describe the gen-

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EXPERT AND OPINION EVIDENCE—Continued.

General Effect of an Ailment—Continued.

eral effects of the ailment, including the suffering which usually follows such a condition. Dreyfus & Co. *v.* Wooters, 42.

Malpractice.—See PHYSICIANS AND SURGEONS.

X-Ray.—A general practitioner of exceptionally high standing in his profession, who had used the X-ray to make photographs, but had never used it curatively, who had had personal experience and knowledge of ulcers caused by X-rays, and from his professional training and reading of scientific books treating of X-rays and the results of their curative use, had a certain degree of knowledge on the subject of the proper curative use of X-rays, which he disclosed to the jury, is qualified to testify on the subject of the general professional standard of skill and care requisite in giving X-ray treatments. Hunter *v.* Burroughs, 113.

FEEBLE-MINDEDNESS. See INSANITY.

FELLOW SERVANTS.

Servants relying on vice-principal's statement that electric current had been cut off. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Instructions.—In the instant case, there was no original defect in the vestibule, but the ice which had suddenly accumulated created the danger, and this danger, according to the evidence of the defendant, had just been created solely because the porter had allowed the water to remain and freeze. If then the jury credited the evidence submittd by the defendant on this point, it would have been clearly their duty to find for the defendant. The refusal of the court thus to instruct them was, therefore, prejudicial. Dreyfus & Co. *v.* Wooters, 42.

Mines and Minerals.—After plaintiff, a miner, had notified his foreman that his place of work was unsafe, the foreman directed the slate men to take down the loose slate or rock at plaintiff's place of work. Section 29, chapter 178, Acts of 1912, declares, that in discharging the duties required by the act, "the mine foreman, boss or fire boss, and their assistants shall be considered as acting for the mine owner or operator as a vice-principal." Held: That the slate men were not fellow-servants of the plaintiff. Jewell Ridge Coal Corp. *v.* Keen, 514.

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FELLOW SERVANTS—Continued.

Porter and Clerk.—A porter in a store, in pursuance of his usual work, washed the windows and mopped the floor of the vestibule, and as the temperature was unusually low, a small quantity of water froze on the floor of the vestibule. A clerk, who was late in reaching her work and was in a hurry, as she entered the vestibule of the store, slipped and fell upon the ice and injured her right shoulder. For this injury the clerk brought an action against her master, the proprietor of the store. Held: That the porter, while in the performance of his ordinary duties under the general directions of his master, was a fellow servant of the plaintiff. Dreyfus & Co. *v.* Wooters, 42.

Reliance on Vice-Principal's Statement.—Where the testimony of an assistant foreman himself left no doubt that he was a vice-principal, and that it was his duty to decide whether the electric current should be cut off, and, therefore, primarily his duty to know whether it was on or off at a given time and place, the plaintiff, a lineman, had the right to rely upon the assistant foreman's statement that the current was cut off when the foreman ordered him to cut a wire which, when connected with the power plant, carried a dangerously heavy electric current, and the question as to whether rubber gloves or other instrumentalities for use in cutting live wires were available to plaintiff and should have been used by him, is immaterial. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Where an assistant foreman, whose testimony showed him to have been a vice-principal, ordered the plaintiff, a lineman, to cut a wire, assuring him that there was no current upon the wire, and the plaintiff, relying upon this assurance, took hold of the wire with his naked hands and was injured, plaintiff might recover against his master. But the burden of proving the above facts to the satisfaction of the jury was upon the plaintiff. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

If an assistant foreman, in the discharge of a non-assignable duty, assured the plaintiff, a lineman, that a wire was dead, there was nothing upon which the doctrine of assumed risk or shifting conditions could rest. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Safe Place to Work.—The rule requiring the master to exercise proper care to provide a reasonably safe place for his employees does not require the master to exercise constant vigilance and supervision over the routine duties of his ser-

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FELLOW SERVANTS—Continued.

Safe Place to Work—Continued.

vants. If such place suddenly becomes unsafe by reason of some negligence of one servant and his fellow servant is thereby injured, the master is not responsible unless within a reasonable time after notice that such place has become unsafe, the master fails to remove the danger. Dreyfus & Co. *v.* Wooters, 42.

FERRIES.

Bridges.—See *infra*, "Exclusiveness."

Eminent Domain.—*Taking Franchise without Compensation.*—A ferry franchise granted by legislative authority exercised by a circuit court is a private property right—an incorporeal heriditament. And to the extent of the right granted by such franchise, such property right is undoubtedly protected by section 58 of article 4 of the Constitution of Virginia of 1902, which provides that the legislature "* * * shall not enact any law whereby private property shall be taken or damaged for public use without just compensation." Snidow *v.* Board of Supervisors, 578.

Taking Private Property without Just Compensation.—If a ferry or bridge is established under a franchise granted by legislative authority as exclusive against the sovereign State, the location and operation by legislative authority of a later rival ferry or bridge so near to the first established as to draw away the travel from it, amounts to a *taking* of the property right in the first ferry, within the constitutional inhibition against the taking of private property for public use without just compensation. Snidow *v.* Board of Supervisors, 578.

Exclusiveness.—See *infra*, "Eminent Domain;" "Impairment of Obligation of Contracts."

Construction of Grant.—Whether the grant of a franchise (such as that under consideration, to-wit, of a ferry) is exclusive as against the sovereign State, is to be determined by the construction of the grant itself. And the grant will be strictly construed against the grantee and in favor of the sovereign; and such a grant will not be deemed exclusive unless expressly so stated in the grant itself or such conclusion arises by necessary implication from the express language of the grant. Snidow *v.* Board of Supervisors, 578.

Establishment of Bridge.—In the case at bar, since the board of supervisors and road commission acted under leg-

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FERRIES—Continued.

Exclusiveness—Continued.

Establishment of Bridge—Continued.

islative authority, authorizing, and, as to the former, also validating, their action in locating and establishing the bridge, together with its approaches, in question, such bridge (with its approaches), in so far as they do not physically obstruct the approaches to the ferry of appellants, did not infringe upon the property rights of appellants in said ferry, and hence will not, by nts drawing away the custom in public travel from such ferry, even though it result in the total withdrawal of such custom therefrom, *take*, or *damage*, the property of appellants within the meaning of section 58 of the Constitution of 1902. And in the instant case there was no evidence tending to show that either of the approaches to the landings of the ferry will be in any way obstructed by the bridge or its approaches. But should the actual construction of the approaches to the bridge physically obstruct the public road approaches to the ferry, the proceedings in the instant cause would furnish no bar against the owners of the ferry in further proceedings to assert their right. Snidow *v.* Board of Supervirors, 578.

Right of Legislature to Establish Rival Ferry.—A grant of a ferry franchise by an act of the legislature, or by a court acting under legislative authority, merely giving the authority to establish and operate a ferry, does not confer an exclusive right, so as to deprive the legislature of power to subsequently authorize another ferry or bridge near the same place (it not being in the same location), without infringing upon the prior grant. And the fact, at the time of the grant of the ferry franchise, there was a general statute (section 1386 of the Code of 1904) in existence, providing that no *court* should grant leave to establish a ferry within half a mile of another ferry legally established, does not change the rule of construction. Snidow *v.* Board of Supervisors, 578.

Franchise.—See EMINENT DOMAIN; and see *infra*, "Exclusiveness;" "Impairment of Obligation of Contracts."

Construction of Grant.—Snidow *v.* Board of Supervisors, 578.

Exclusiveness.—In a controversy between the owner of a ferry, which is exclusive against all others not acting under legislative authority and is derived by legislative grant, and a person or corporation, not acting under legislative grant,

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FERRIES—Continued.

Franchise—Continued.

Exclusiveness—Continued.

purporting to authorize such action without liability for damages, where a bridge across the same stream is erected and operated by the latter so near to the ferry as to draw away its custom, this will be held to be an infringement of the ferry-franchise, although the approaches and operation of the ferry may not be physically obstructed thereby; and such owner or operator of the bridge will be liable in damages to the owner of the ferry for drawing away the custom of the latter. Snidow *v.* Board of Supervisors, 578.

A franchise may be granted as exclusive as against some persons and not against others. That is to say, a franchise may be, and most often is, granted as exclusive as against all persons other than the sovereign granting it, but not as exclusive in the sense that the sovereign may not itself subsequently exercise or grant to another the right to exercise the same or a similar franchise so near the same locality occupied by that first granted as to interfere with and perhaps wholly to destroy the income enjoyed by the latter from such prior franchise and the investment of capital therein. Consequently, there is a most important and fundamental difference between the rights of holders of franchises in controversies with rival operations, where the latter are not authorized by legislative authority, from the cases where the rival operations are so authorized. Snidow *v.* Board of Supervisors, 578.

Impairment of Obligation of Contracts.—An express grant of an exclusive franchise as against the sovereign State is a contract between the grantee and the State and any subsequent act of the legislature of the State impairing its obligation is void under the federal Constitution. Snidow *v.* Board of Supervisors, 578.

FINAL JUDGMENTS AND DECREES. See APPEAL AND ERROR.

Contempt.—The fact that a decree is final does not render the court powerless to enforce it by contempt proceedings, and such proceedings would not be a procedure *in the cause*, which was ended, but a procedure *beyond* the cause for the enforcement of the decree. Rinehart & Dennis Co. *v.* McArthur, 556.

Order Directing Payment of Money.—A decree which disposed of the whole subject of litigation, including the costs, and

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FINAL JUDGMENTS AND DECREES—Continued.

Order Directing Payment of Money—Continued.

directed the clerk to pay over to the defendant, or to whom he should direct, money deposited by the defendant to abide the decree, and struck the case from the docket, is a final decree. Rinehart & Dennis Co. *v.* McArthur, 556.

FIRE INSURANCE.

Assignment of Policy.—Under a policy of insurance, which provides that the policy shall be void if it is asigned before loss, an actual assignment of the policy without the consent of the company will work a forfeiture, but a mere agreement to assign it will not. Aetna Ins. Co. *v.* Aston, 327.

After the risk has terminated by fire, the interest of the assured becomes a *chose in action*, which he has a right to assign, in spite of the usual clause against assignment, without asking permission of the company. Aetna Ins. Co. *v.* Aston, 327.

Burden of Proof.— See *infra*, "Presumptions and Burden of Proof."

Change of Ownership or Possession.—See *infra*, "Title, Ownership and Possession."

False Statements.—See *infra*, "Misrepresentation."

Judgment.—A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of conditions, does not affect the validity of the policy, and, if a loss occurs before the conditions are performed, a recovery may be had by the insured even though the conditions are subsequently performed, and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit. Aetna Ins. Co. *v.* Aston, 327.

Misrepresentation.—In an action upon a fire insurance policy whether plaintiff made false statements in making his proof of loss is a question for the jury under all the facts and circumstances of the case. Aetna Ins. Co. *v.* Aston, 327.

Presumptions and Burden of Proof.—Whether the company, in defending an action on a policy, relies upon the falsity of a particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact in either aspect. Aetna Ins. Co. *v.* Aston, 327.

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FIRE INSUANCE—Continued.

Questions of Law and Fact.—See *infra*, "Misrepresentation;" "Title, Ownership and Possession."

Whether a company, in defending an action on a policy, relies upon the falsity of a particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact in either aspect. Aetna Ins. Co. *v.* Aston, 327.

Representation.—See *infra*, "Misrepresentation."

Right of Possession.—See *infra*, "Title, Ownership and Possession."

Title, Ownership and Possession.—If at the time of the fire there had been no change in the title and ownership of the property, it necessarily follows that there had been no change in the *right* of possession, as distinguished from mere occupancy. Aetna Ins. Co. *v.* Aston, 327.

A. agreed with K. and his wife to exchange A.'s mill property and other property for K.'s farm and a lot. The contract for the exchange purported to be with K.'s wife also, but she did not sign it, although she owned, with her husband, a one-half undivided interest in the farm, and had her inchoate dower interest in all of the land owned by her husband. There was a verbal agreement that A. would assign his insurance to K., and that K. would assign his insurance to A. K. took possession of the mill. The trade was not closed by deeds because there was a deed of trust lien on both properties, but deeds were made and deposited, in escrow, with a bank. This status remained until fire destroyed the mill. By a supplemental contract dated after the fire, it was recited that all of the conditions of the original contract had been complied with, and in consideration thereof, A. bound himself to pay over to K. the insurance collected on account of the fire loss. Held: That there had been no change in title, ownerhip, or in the legal right of possession of the property within the clause of the policy providing for its forfeiture upon such change without the consent of the company. Aetna Ins. Co. *v.* Aston, 327.

The change of possession contemplated by the policy is a change in the lawful right of possession as distinguished from mere occupancy. Aetna Ins. Co. *v.* Aston, 327.

Possession under the alienation clause means, in general, the right of possession, rather than the physical occupancy of the property. Aetna Ins. Co. *v.* Aston, 327.

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FIRE INSURANCE—Continued.

Title, Ownership and Possession—Continued.

Where a policy permits a change of occupants without an increase of hazard, it is for the jury to determine whether or not the change increased the risk. Aetna Ins. Co. *v.* Aston, 327.

A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon performance of conditions, does not affect the validity of the policy, and, if a loss occurs before the conditions are performed, a recovery may be had by the insured even though the conditions are subsequently performed, and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit. Aetna Ins. Co. *v.* Aston, 327.

Under section 2860, Code of 1904, K., in the instant case, could have sued in his own name, but not having done so, a recovery for his benefit is not thereby barred. It appearing from the record that the suit is in fact for the benefit of K., the judgment may be so marked and rendered even after verdict. The endorsement of the fact is sometimes not made until after the execution is issued. Aetna Ins. Co. *v.* Aston, 327.

FIRE LIMITS. See MUNICIPAL CORPORATIONS.

FIRES.

Action for Destroying a Building to Prevent the Spread of Fire.—Fardis *v.* E. I. DuPont, Etc., Co., 88.

FOREIGN CORPORATIONS.

Business Domicile.—Union Tanning Co. *v.* Commonwealth, 610.

Domicile.—See TAXATION.

Principal Place of Business.—See TAXATION.

Union Tanning Co. *v.* Commonwealth, 610.

Taxation.—See TAXATION.

FORFEITURE. See PENALTIES AND FORFEITURES.

FORGERY.

Proof to Sustain.—It is a fundamental principle of law that fraud must be clearly alleged and proven. Every presumption is in favor of innocence and not of guilt. In the instant

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FORGERY—Continued.

Proof to Sustain—Continued.

case it was alleged that a certain deed was a forgery, but there was no evidence to sustain the averment. **Branham** *v.* Clinchfield Coal Corp., 346.

FORMER ADJUDICATION OR RES ADJUDICATA.

Judgment on Appeal.—In the instant case, in view of the fact that the record suggested the possibility that the defendants were overconfident in their view that a court of equity had no jurisdiction, and, therefore, failed fully to present the evidence upon which they relied in support of their claim of title, the decree of the lower court was affirmed by the Supreme Court of Appeals, without prejudice to the right of the defendants hereafter to assert their title to the property in an action of ejectment, if they should be so advised. Cumbee *v.* Ritter, 448.

Matters Not in Issue.—Where the record in a case presented no controversy between the assignor and assignee over the fund in dispute deposited with the clerk of the court, the decree in the case directing the clerk to pay the money deposited to the assignor does not render the matter in controversy *res judicata.* Rinehart & Dennis Co. *v.* McArthur, 556.

FORTHCOMING AND DELIVERY BONDS.

Construction.—Inasmuch as the statutory proceedings by interpleader in Virginia is a substitute for the common-law writ of replevin, it is proper to construe a bond given by a claimant of property taken under execution, which, although not valid as a statutory forthcoming bond under section 3004 of the Code of 1904, but good as a common-law bond, as it would have been construed at common law, if it had been a replevin bond, or a redelivery bond, in an action of replevin. Kiser *v.* Hensley, 536.

Failure of Claimant to Institute Statutory Proceedings.—A claimant of property levied on under an execution filed a suspending bond, but failed to institute his interpleader proceedings under the provisions of section 3001 of the Code of 1904 within thirty days from the date of the suspending bond. Held: That from the expiration of the period of thirty days, the possession of the property by the claimant was unlawful, and hence at his risk. Kiser *v.* Hensley, 536.

Measure of Recovery.—See *infra*, "Statutory Bond as Common-Law Bond."

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FORTHCOMING AND DELIVERY BONDS—Continued.

Replevin Bond.— See *infra*, "Construction."

The measure of recovery on a replevin bond, when part of the goods only are returned, is the value of the goods not so returned. Kiser *v.* Hensley, 536.

Section 3004, Code of 1904—Failure to Comply with Statute—Under section 3004, Code of 1904, a bond payable to the sheriff and not to the creditor, which does not recite the amount due upon the execution, including the fee for taking the bond, commissions, and other charges, and conditioned that the claimant shall have property forthcoming and subject to the order of the court, instead of forthcoming at such time and place of sale as may be thereafter lawfully appointed, as required by the statute, is not good as a statutory forthcoming bond. Kiser *v.* Hensley, 536.

Statutory Bond as Common-Law Bond.—To be good as a statutory bond, bonds must substantially conform to the statutes authorizing their execution. Unless they do so conform, while they may be good as common-law bonds, they are not valid as statutory bonds. Kiser *v.* Hensley, 536.

In the case at bar, which was a motion on a bond given by a claimant to a sheriff for property levied on under an execution, which bond was not valid as a statutory for the coming bond under section 3004 of the Code of 1904, but was good as a common-law bond, the measure of recovery, for failure to produce for sale the property levied on, was not the exception debts, principal, interest, costs and commissions, but the value of the property levied upon, and it may be doubted whether, even if the bond had conformed strictly to the statute, the measure would have been different. If the value of the property levied on had exceeded the amount of the execution, the measure of recovery would have been the amount of the execution, interest, costs, etc. Kiser *v.* Hensley, 536.

Unlawful Possession by Claimant.—See *infra*, "Failure of Claimant to Institute Statutory Proceedings."

FRANCHISE. See FERRIES.

Exclusiveness.—A franchise may be granted as exclusive as against some persons and not against others. That is to say, a franchise may be, and most often is, granted as exclusive as against all persons other than the sovereign granting it, but not as exclusive in the sense that the sovereign may not itself subsequently exercise or grant to another the right

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FRANCHISE—Continued.

Exclusiveness—Continued.

to exercise the same or a similar franchise so near the same locality occupied by that first granted as to interfere with and perhaps wholly to destroy the income enjoyed by the latter from such prior franchise and the investment of capital therein. Consequently, there is a most important and fundamental difference between the rights of holders of franchises in controversies with rival operations, where the latter are not authorized by legislative authority, from the cases where the rival operations are so authorized. Snidow *v.* Board of Supervisors, 578.

FRAUD AND DECEIT.

Evidence.—See *infra*, "Proof to Sustain."

Proof to Sustain.—It is a fundamental principle of law that fraud must be clearly alleged and proven. Every presumption is in favor of innocence and not of guilt. In the instant case it was alleged that a certain deed was a forgery, but there was no evidence to sustain the averment. Branham *v.* Clinchfield Coal Corp., 346.

FRAUDULENT AND VOLUNTARY CONVEYANCES.

Absence of Fraud.—If there is no evidence of an intent on the part of the debtor to hinder, delay or defraud his creditors, they cannot assail a purchase of land by him, even though he made a bad bargain and agreed to pay more for the land than it is worth. In the absence of fraud, unsecured creditors cannot question the contracts of their debtors and undo all that is not beneficial to them. Catron *v.* Bostic, 355.

Creditor of Purchaser.—See *infra*, "Absence of Fraud."

Parties.—In a suit to set aside a deed as fraudulent, the remaindermen, under the deed are necessary parties. Jeffries *v.* Jeffries' Ex'or, 147.

Void or Voidable.—A conveyance of land with intent and for the purpose of hindering and evading the vendor's creditors is not void, but voidable only. It is valid between the parties and neither can undo it without the consent of the other; but it is void as to the creditors of the vendor. In the absence of evidence of an intent by the purchaser to defraud his creditors, they cannot assail the transaction. Catron *v.* Bostic, 355.

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GARNISHMENT.

County as Garnishee.—See MULTIFARIOUSNESS.

Estoppel.—*Answer in Garnishment Proceedings.*—The answer of vendees in garnishment proceedings admittin a balance of indebtedness under the contract of sale to the vendor is not inconsistent with vendees' claim of title to the lumber itself under the contract of sale or their right to charge the vendor with any advances or loans the vendees may have made to him under the contract of sale or otherwise. Ellis, Etc., Co., *v.* Hubbard, 481.

GIFTS.

Presumptions and Burden of Proof.—*Members of a Family.*—Although in the absence of evidence to the contrary, services and payments made by members of the same family and household to each other are presumed to be gifts, charges regularly made by a step-son, a merchant, against his step-mother and accounts rendered therefor negatives the suggestion that these payments were intended as gifts, and show clearly that they were not so intended. Buchanan, Adm'r *v.* Higginbotham, 662.

GRANT. See OYSTERS; STATUTES.

GUARDIAN AD LITEM. See INFANTS.

HARMLESS ERROR. See APPEAL AND ERROR.

HAWKERS AND PEDDLERS.

Bakers.—See *infra*, "Licenses."

License.—Section 50 of the tax law of 1916 (4 Va. Code [Pollard], page 601), defining who should be considered peddlers, excepted from its provisions "those who sell or offer for sale, in person or by their employees, ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruit or other family supplies of a perishable nature, grown or produced by them and not purchased by them for sale." Held: That a corporation which did not purchase bread for sale, but produced and sold it at retail directly to householders and consumers in the city, both from its place of business and from its delivery wagons, was within the exception of the statute, as bread is a family supply of a perishable nature. Corby Baking Co. *v.* Commonwealth, 10.

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HIGHWAYS. See STREETS AND HIGHWAYS.

HOMICIDE.

Accused Previously Arming Himself.—On a trial for homicide, the court instructed the jury that a person reasonably apprehending attack has a right to arm himself for his necessary self-defense, and also that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any or upon slight provocation, is *prima facie* wilful and premeditated killing. These two instructions were given upon opposing theories, and there was no prejudicial conflict between them. Stapleton *v.* Commonwealth, 825.

On a trial for homicide, when the court told the jury that the accused had the right to arm himself, it was not error to also instruct them that the use of the weapon was sufficient to raise a presumption of malice. Stapleton *v.* Commonwealth, 825.

Evidence Necessary to Sustain Conviction.— See *infra*, "Reasonable Doubt."

Instructions Read as a Whole.—In the instant case the court instructed the jury, at the request of the Commonwealth, that if the accused killed deceased in execution of a previously existing grudge, and pursuant to a previously declared purpose, the homicide was murder in the first degree. It was objected to this instruction that it failed to place upon the Commonwealth the burden of proving the existence of the grudge and the declared purpose to kill, and, further, ignored the defendant's theory of the killing. The instructions given upon the trial fully and fairly presented to the jury the respective theories and contentions of the Commonwealth and the accused. Under the familiar rule applying to both civil and criminal cases, instructions are to be read as a whole. When so read in this case, the alleged defects in the Commonwealth's instruction in question disappear. Instructions given for the defendant, in no way conflicting with those given for the Commonwealth, not only presented every aspect of the defense relied upon, but repeated and emphasized the burden upon the Commonwealth to prove, to the exclusion of all reasonable doubt, every element necessary to a conviction under the indictment. Stapleton *v.* Commonwealth, 825.

Malice.—See *infra*, "Accused Previously Arming Himself."

Murder.—See *infra*, "Accused Previously Arming Himself."

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HOMICIDE—Continued.

Murder in the First Degree.—See *infra*, "Previously Existing Grudge."

Presumptions and Burden of Proof.— See *infra*, "Instructions Read as a Whole."

Previously Existing Grudge.—A homicide in execution of a previously existing grudge, and pursuant to a previously declared purpose, is murder in the first degree. **Stapleton *v.* Commonwealth, 825.**

See *infra*, "Instructions Read as a Whole."

Reasonable Doubt.—The facts adduced by the prosecution to convict the accused, considered collectively as they must be when circumstantial evidence is relied on, are just as consistent with his innocence as with his guilt, and when this is true, that interpretation which acquits him must be adopted, for it is fundamental that if there be a reasonable doubt of his guilt there can be no conviction. After six trials the Commonwealth has failed to produce evidence sufficient to sustain a conviction. Suspicion cannot be substituted for proof, and upon this evidence the accused is entitled to an acquittal. Canter *v.* Commonwealth, 794.

Threats.—*Uncommunicated Threats.*—On a trial for homicide the jury were instructed, at the request of the Commonwealth, that threats made by the deceased against the prisoner were to be received with great caution, and it must be shown that the threats were communicated to the prisoner prior to the killing, before they could be considered as affording any justification of the homicide. The jury were also instructed, at the request of the accused, that if threats were made by deceased against defendant, such threats are evidence to be considered by the jury in determining the reasonableness and *bona fides* of the defendant's plea of self-defense and of his belief that the deceased meant to kill or do him some serious bodily harm. Held: That the first of these instructions stated the law correctly, and if it be conceded that the second was correct, it was not in substantial conflict with the first. But the Supreme Court of Appeals did not find it necessary to decide whether the second instruction was right, and expressed no opinion when, if ever, uncommunicated threats are admissible in evidence. Stapleton v. Commonwealth, 825.

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HUSBAND AND WIFE.

Assault and Battery—*Action by Wife.*—At common law a wife could not maintain an action for damages for an assault upon her by her husband during the coverture. Keister's Adm'r *v.* Keister's Ex'ors, 157.

Action for Death.—Section 2286-a of the Code of 1904 provides as follows: "A married woman may contract and be contracted with, sue * * * in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by * * * her, shall have accrued before or after the passage of this act." Held: That this statute has not conferred upon a married woman a right of action against her husband for damages for an assault upon her committed by the husband during the coverture. It follows, therefore, that the personal representative of a wife, who was killed by her husband when the husband and wife were living together in that relationship, has no right of action against the husband or his personal representative for the death of the wife. Keister's Adm'r *v.* Keister's Ex'ors, 157.

The portion of the act quoted in the preceding headnote had reference only to the remedies thereby given to a married woman. It merely provides that at all times during the coverture a married woman is thereby given a right to sue, provided she had, at the time it is alleged that the cause of action arose, the substantive civil right which was necessary to give rise to such cause of action, and does not confer the substantive right necessary to support the right of a married woman to sue her husband for an assault upon her committed by him during the coverture. Keister's Adm'r *v.* Keister's Ex'ors, 157.

Death by Wrongful Act.—Section 2286-a of the Code of 1904 provides as follows: "A married woman may contract and be contracted with, sue * * * in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by * * * her, shall have accrued before or after the passage of this act." Held: That this statute has not conferred upon a married woman a right of action against her husband for damages for an assault upon her committed by the husband during the coverture. It follows, therefore, that the personal representative of a wife, who was killed by her husband when the husband and wife were living together in that relationship, has no right of action against the husband or his personal representative for the death of the wife. Keister's Adm'r. *v.* Keister's Ex'ors, 157.

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HUSBAND AND WIFE—Continued.

Death by Wrongful Act—Continued.

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Names.—See *infra*, "Pleading."

Pleading.—*Christian Name of a Married Woman.*—In a proceeding by motion for judgment to recover damages for the negligent killing of plaintiff's intestate against a husband and wife, the wife should be impleaded by her own *baptismal*, or *Christian name*, and not by the initial letters of her husband's name; the former is her legal designation. Ratcliffe *v.* McDonald's Adm'r., 781.

"Unmarried."—The word "unmarried" originally and ordinarily means, it is true, *never having been married*, but the term is a word of flexible meaning and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question*, and as the term is used in section 2286-a, Code of 1904, it has the meaning of "not having a husband" at the time of the suit or action. Keister's Adm'r *v.* Keister's Ex'ors, 157.

HYPOTHETICAL QUESTION. See SALES.

ILLEGAL CONTRACTS.

Stifling Bidding.—A secret agreement entered into between the purchaser of a farm, his broker, and a third party, that if the third party would withdraw an offer of his for the farm, the purchaser would consummate his purchase and then sell to the third party for the price offered by him, was illegal as an agreement to stifle bidding, and opposed to public policy. Kincheloe *v.* Taylor, 178.

IMPLIED CONTRACTS.

Where Express Contracts Exist.—Where there is an express and enforceable contract in existence which governs the rights

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IMPLIED CONTRACT—Continued.

Where Express Contracts Exist—Continued.

of the parties, the law will not imply a contract in contravention thereof. It is only in the absence of an express or of an enforceable contract between the parties, that the law (whether at law or in equity) will, from circumstances, imply a contract between them. Ellis, Etc., Co. *v.* Hubbard, 481.

INDEPENDENT CONTRACTOR.

Liability of Abutting Owner.—Where a boy rightfully in a street is injured by a gate which opened out into the street falling upon him, the owner of the premises upon which the gate is situated is liable for injuries to the boy, although the gate was erected by an independent contractor and its fall was due to negligence in construction. King *v.* Hartung, 185.

Malicious Prosecution.—The person who arrested plaintiff was not on defendant company's payroll. The company paid a detective agency for his services and the agency paid him a salary. But it appeared from the evidence that he looked to the defendant for his instructions, was subject to its orders and directions, and that his principal business was to carry out the wishes and the purposes and policy of the defendant company in connection with the preservation of order and the enforcement of law at its plant, and in the instant case he did not procure or ask for a warrant until after a conference with defendant's superintendent. Held: That the relationship of master and servant was established between the defendant company and the person causing the arrest of plaintiff, and that the independent contractor doctrine did not apply. Clinchfield Coal Corp. *v.* Redd, 420.

Owner Exercising General Supervision over Work.—Where a landowner, who has employed a competent workman to erect a gate, is present exercising a general supervision over the work, the employee is not an independent contractor. King *v.* Hartung, 185.

Who Is.—An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work. Clinchfield Coal Corp. *v.* Redd, 420.

INDICTMENT AND INFORMATION.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

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INFANTS.

Appearance.—*Guardian Ad Litem.*—In an order reviving a suit, counsel for one of the defendants was appointed guardian *ad litem* for an infant, who was interested in the result of the suit. No answer was filed by him as guardian *ad litem*, but the decree ordering the revival was endorsed "seen" and signed by him, though nothing appeared to indicate that he signed it as guardian *ad litem*. Held: That this was not sufficient evidence of acceptance of the office of guardian *ad litem*, and certainly did not amount to an appearance of the infant by his guardian. Jeffries *v.* Jeffries, Ex'or, 147.

Creditors' Suits.—Where infants were entitled to a share in a decedent's estate, and in the prayer of a bill by a creditor to subject the real estate of the decedent to his debts, it was asked that a guardian *ad litem* be appointed, but no names were given, no process was served on them, no guardian *ad litem* appointed, and no answer filed by or for them, their interests are unaffected by any proceedings in the cause. Catron *v.* Bostic, 355.

Guardian Ad Litem.—See *infra*, "Appearance;" "Creditors' Suits."

Where the interests of infants are concerned it must affirmatively appear from the record that a guardian *ad litem* was duly appointed. Where the record is silent on the subject, it will not be presumed. Catron *v.* Bostic, 355.

Sale of Infants' Lands.—Nowhere has the property of infants been more carefully guarded against injudicious sales than in this State. The legislature has wisely surrounded such sales with all reasonable safeguards and the courts have been astute to give effect to this protective legislation. Watkins *v.* Ford, 268.

Sale of Interest of Remaindermen.—See REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Inheritance Tax.—See SUCCESSION TAXES.

INJUNCTIONS.

Fire Limits.—Increase in fire risk and cost of insurance, caused by the erection, in violation of a town ordinance, of a wooden instead of a brick wall adjoining appellants' building, does not result in such special and irreparable damage to appellants' property as to entitle them to injunctive relief. Landon *v.* Kwass, 544.

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INJUNCTIONS—Continued.

Fire Limits—Continued.

Appellees erected a wooden instead of a brick wall on their premises adjoining the property of appellants. There could be no doubt that the appellees would have had the right to do what they did but for the provisions of a town ordinance. The ordinance itself was fully warranted by the charter of the town, and reserved to the council the discretion to determine whether a building erected in violation thereof should be torn down. Since the appellants are dependent entirely for their standing in court upon the ordinance, it would seem clear that they could not call upon a court of equity to exercise a discretion which that ordinance expressly reserved to the town council; therefore, a court of equity has no jurisdiction to grant a mandatory injunction against such wall. Landon *v.* Kwass, 544.

Irreparable Damage.—See *infra*, "Fire Limits."

Jurisdiction.—See *infra*, "Violation of Town Ordinance."

Limitation of Actions.—See NUISANCES.

Nuisances.—See NUISANCES.

Ordinances.—See *infra*, "Violation of Town Ordinances."

Trees and Timber.—A bill to enjoin defendants from cutting and removing timber, which shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably necessary for farm uses, and alleges the insolvency of the defendants, is not demurrable. Cumbee *v.* Ritter, 448.

Trespass.—A bill to enjoin defendants from cutting and removing timber, which shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably neeesary for farm uses, and alleges the insolvency of the defendants, is not demurrable. Cumbee *v.* Ritter, 448.

Violation of Town Ordinance.—Equity will not restrain an act merely because it is in violation of a town ordinance; but where the violation of the ordinance results in special and irreparable injury to private property, the owner is entitled to injunctive relief. Landon *v.* Kwass, 544.

INSANITY.

Feeble-Mindedness—*Acts 1916, page 662, et seq.—Judge Does Not Try Issue.*—The statute does not contemplate that the judge should try the issue whether the alleged feeble-minded-

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INSANITY—Continued.

Feeble-Mindedness—Continued.

ness exists or not. The "commission" is the tribunal created by the statute for the trial of such issue. Mallory *v.* Va. Colony Feeble-Minded, 205.

Jurisdiction of Commission.—The statute prescribes a certain procedure to be followed in order to confer jurisdiction on the commission to make the inquiry and report. Some procedure giving notice to the person proceeded against is essential to the due process of law which is guaranteed to every person by the fourteenth amendment to the Federal Constitution, and had the statute not provided for some such procedure, it would have been itself null and void because unconstitutional. However, the statute under consideration does provide for due process of law, in that it requires that the proceeding shall be inaugurated by a petition "setting forth under oath the circumstances indicating the feeble-mindedness of the person named," and containing other statements such as are specified in section 2 of the statute. Then the issuance of a warrant for the alleged feeble-minded person and a summoning of the persons named in the petition is required by section 3 of the statute. And by section 4 of the statute an appeal is given to the person accused of feeble-mindedness to the Supreme Court of Appeals, following the disposition of the case by the circuit or corporation court, or judge thereof. Mallory *v.* Va. Colony Feeble-Minded, 205.

Proceedings.—Under the Acts of Assembly of 1916, page 662, *et seq.*, defining feeble-mindedness and providing for the examination, commitment and custody of feeble-minded persons, there was filed before the judge of the Hustings Court of the city of Richmond a report in writing of a "commission" which purported to have been composed of the persons designated in section 3 of said statute, setting forth the testimony before the "commission" and its finding that the petitioner "is feeble-minded and ought to be confined in an institution for the feeble-minded," as stated in such report, and the judge based the order complained of, committing the petitioner to the custody and control of the defendant, upon such report. The Supreme Court of Appeals was of the opinion that if such report had been accompanied by such a record as would have shown that the "commission" had jurisdiction to make it, that the report might be treated as substantially the "petition" to the judge required by section 4 of said statute, and the said judge would have

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INSANITY—Continued.

Feeble-Mindedness—Continued.

Proceedings—Continued.

had jurisdiction to enter the order complained of upon such report. Mallory *v.* Va. Colony Feeble-Minded, 205.

Substantial Compliance With Statute.—A substantial compliance with the requirements as to procedure is esential to the jurisdiction of the commission and of the court, judge or justice. The whole proceeding in such a case is statutory, and, in analogy with the well understood doctrine touching the special jurisdiction of courts conferred by statute, the statutory requirements as to procedure are jurisdictional and must be at least substantially complied with, otherwise any order entered in the case will be null and void. Mallory *v.* Va. Colony Feeble-Minded, 205.

In the case at bar, there was no petition under oath inaugurating the proceeding, and there was no warrant issued for the alleged feeble-minded person. Therefore, the procedure was not a substantial compliance with the requirements of the statute, and the order of court under which the defendant justified its custody and control of the petitioner, the alleged feeble-minded person, was null and void. Mallory *v.* Va. Colony Feeble-Minded, 205.

INSTRUCTIONS.

Assignments of Error.—*Points Not Raised by Assignments.*—Where an instruction is not free from all exception, but is not open to the objection urged against it in the assignments of error, the objection made in the assignments of error is the only objection which the Supreme Court of Appeals will consider. City of Charlottesville *v.* Jones, 682.

Assumption of Risk.—See MASTER AND SERVANT.

Bridges.—See BRIDGES.

Conflicting Theories.—See *infra*, "Must Be Complete."

Damages.—See DAMAGES.

Directing Verdict.—See VERDICT.

Evidence.—See *infra*, "Must Be Based on Evidence."

Exception to Instructions.—A general exception to all of a number of instructions, followed by specific objections to each, is a sufficient compliance with the statute; and to require a separate certificate, signed by the judge, to be appended to each instruction given or rejected, would introduce an in-

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INSTRUCTIONS—Continued.

Exception to Instructions—Continued.

convenient rule of practice not required by the statute, and needlessly incumber the record without any resultant benefit. Ratcliffe *v.* McDonald's Adm'r, 781.

Failure to Present Theory of One of the Parties.—See *infra*, "Must Be Complete."

Instruction Cured by Other Instruction.—See BRIDGES.

Instructions Read Together.—See BRIDGES; and see *infra*, "Malicious Prosecution."

Intoxicating Liquors.—See INTOXICATING LIQUORS.

Malicious Prosecution.—*Instructions Are to Be Read Together.*—In an action for malicious prosecution, an instruction that malice may be inferred from want of probable cause, standing alone, might have constituted reversible error. But instructions are to be read as a whole, and the instruction in question itself told the jury in effect that the burden was on the plaintiff to establish by a preponderance of the evidence, not only the negative proposition that the prosecution was instituted without probable cause, but also that it was malicious; and another instruction precluded any probability of a misapprehension in this respect on the part of the jury. Clinchfield Coal Corp. *v.* Redd, 420.

Must Be Based on Evidence.—In a statutory proceeding to ascertain the true boundary line between the lands of the plaintiff and the defendant, the evidence showed that the land in controversy was in timber, so overgrown with underbrush that one could not see through it, and that the location of the line could only be fixed by a survey. There was no evidence that it was in any way improved or cultivated, and the only acts of ownership alleged were the occasional cutting of trees and raking of shatters. No instruction was given as to the effect of these alleged acts of ownership, but the court instructed the jury that if the defendant "entered upon the land in controversy, improving and sultivating a part and claiming title to the whole, she was in actual possesion of the whole land within her boundaries and what is the whole is to be determined by the limits, owned or claimed." Held: That as there was no other evidence even tending to support the instruction given the instruction was misleading, without evidence to support it, and constituted error to the prejudice of the plaintiff. Wilkins *v.* Henderson, 275.

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INSTRUCTIONS—Continued.

Must Be Based on Evidence—Continued.

While it is error to give instructions when there is no evidencee tending to prove the facts upon which the instructions are based, the Supreme Court of Appeals cannot pronounce instructions erroneous merely if of the opinion that the suggestions of fact therein are against the weight of evidence. To the jury is confided the responsibility of determining the weight of the testimony, and if there is evidence introduced upon which the instructions may be based the giving of the instructions by the lower court is not error. Stuart, Gov., *v.* Smith-Courtney Co., 231.

Must Be Complete.—It is error to give an instruction directing a finding for the plaintiff or the defendant on an incomplete or partial view of the evidence. Wilkins *v.* Henderson, 275.

Where, as in the instant case, the evidence presents conflicting theories of a case, each party is entitled to an instruction submitting his theory to the jury. An instruction covering only one of such theories gives undue emphasis to that theory, and does not fairly submit the case to the jury, and for that reason is erroneous. In the case at bar the court granted plaintiff's instruction directing a verdict for him and refused an instruction requested by defendant submitting his opposing theory of the case. The evidence vouched in support of it proved, or tended to prove, the correctness of the theory. Held: That the court erred in rejecting the instruction. Baylor *v.* Hoover, 659.

In the instant case, the defendant relied upon two defenses: First, that the land in controversy was within the boundaries called for by her deed, and, second, that if not within such boundaries, the defendant had acquired title by adverse possession. Two instructions were tendered by the plaintiff and rejected by the court. Each of the instructions asked was applicable solely to the defense of title by adverse possession, and, although the land in controversy may have been within the boundaries of the defendant's deed, and passed to her by her deed, yet each of these instructions directed a verdict in favor of the plaintiff. The land in controversy was a parcel of a large tract, much of which was arable land, and had been in the possession of the defendant for a long number of years. The defendant entered into possession of a part of the tract, claiming title to the whole, according to the boundaries claimed in her deed, thus extending her possession to the entire tract, including

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INSTRUCTIONS—Continued.

Must Be Complete—Continued.

the land in controversy, if it was within her boundary. As the plaintiff did not claim title by adverse possession the defendant was entitled under the evidence to a verdict in her favor if the land in controversy was within the calls of her deed, and yet, each of the instructions directed a finding for the plaintiff unless defendant established her claim of title by adverse possession. Held: That this was manifest error, and justified the court in refusing to grant the instructions. Wilkins *v.* Henderson, 275.

In a proceeding by motion against husband and wife to recover for the negligent death of plaintiff's intestate, an instruction concluded with the direction that the jury should find for the plaintiff against both defendants, if they believed from the evidence the facts upon which the instruction was predicated. The rule is that where an instruction so concludes it is bad unless it covers every phase of the case that is supported by evidence. The instruction in question ignored that rule, in that it left out of consideration the question of the contributory negligence of plaintiff as affecting his right to recover at all, and therefore should have been refused. Ratcliffe *v.* McDonald's Adm'r, 781.

Peremptory Instructions.—See VERDICT.

Read as a Whole.—See HOMICIDE.

Read in Light of Facts.—Instructions must always be read in the light of the facts of the particular case. Clinchfield Coal Corp. *v.* Redd, 420.

Repetion.—Where the instructions in a case cover the law of the case adequately, there is no error in the rejection of other instructions, containing correct propositions of law applicable to the case, which were substantially embodied in the instructions given. Clinchfield Coal Corp. *v.* Redd, 420.

Undue Prominence to Particular Matters.—See *infra*, "Must Be Complete."

INSURANCE

Fire Insurance.—See FIRE INSURANCE.

Representation.—See FIRE INSURANCE.

INTEREST.

Sale of Timber.—See TREES AND TIMBER.

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INTEREST—Continued.

Taxation.— See TAXATION.

INTERPLEADER. See FORTHCOMING AND DELIVERY BONDS.

Mandamus.—See MANDAMUS.

INTERPRETATION AND CONSTRUCTION. See STATUTES.

Sales.— See SALES.

Wills.— See WILLS.

INTOXICATING LIQUORS.

Carrying Liquor on Person or in Baggage.— See *infra*, "Harmless Error."

Confessions.—See CONFESSIONS.

Corpus Delicti.—In the instant case, the *corpus delicti*—the unlawful transportation of the whiskey—was proved by the direct testimony of the officer making the arrest, independently of the admission of the accused that it was his whiskey. Held: That the evidence was sufficient to support the verdict of the jury finding the accused guilty of transporting whiskey contrary to law. Collins *v.* Commonwealth, 815.

Curtilage.—The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment: the yard, garden or field which is near to and used in connection with the dwelling. Pettus *v.* Commonwealth, 806.

Accused owned a city lot, fronting on two streets. On one front there were two store buildings six or seven feet apart, with an alley-way between them and connected by a hallway. In one of these buildings accused conducted the business of selling soft drinks, and in the other a grocery. Accused was unmarried and without family, and had a room over the store in which he sold soft drinks. There was a staircase leading from the room in which he slept down into the soft drink establishment, and there was an entrance from his sleeping room across the hall into the storage room over the grocery store from which a stairway led down into the grocery store. On the other street front there was another building, the lower floor being a vacant store, and the upper occupied by a tenant and his family. The rear of this building was about one hundred feet from the rear of the double store on the other street. Accused

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INTOXICATING LIQUORS—Continued.

Curtilage—Continued.

stored liquor in the grocery store and under the floor of the vacant store. Held: That the two store rooms in which the liquor was stored were not within the curtilage of the *bona fide* home of the acused. Pettus *v.* Commonwealth, 806.

Demurrer.—An indictment under the prohibition act, in the form authorized by the statute, is not demurrable. Pettus *v.* Commonwealth, 806.

Evidence Held Not Sufficient to Support Conviction.—In the case at bar, the only witness for the Commonwealth testified that in a conversation with the accused, he told acused that he was sick with rheumatism and asked if the accused knew where the witness could get any liquor. Accused said he did not have any, and did not know where any could be obtained. Witness then asked acused, if he could find any, to get a quart for him and put it away. Accused said he would do his best for witness, and that witness should look about accused's coal house for it. Two or three days afterwards, witness went to accused's store, got a bucket from accused and went down to a branch to get water. On returning from the branch witness found a bottle of whiskey between two logs fifteen or twenty feet from the coal house. Witness took the bottle and left $1.50 where he found it. Witness did not speak to accused about liquor that day, and accused did not know that he was coming that day. Accused placed two disinterested witnesses on the stand, who testified that they saw another than the accused hide the whiskey at the place where it was found. Accused denied that he knew anything about the whiskey or got the $1.50. Held: That the testimony was plainly insufficient to sustain a verdict of guilty. Artrip *v.* Commonwealth, 790.

Harmless Error.—See *infra*, "Transportation."

In the case at bar, defendant objected that an instruction by the court below improperly and unlawfully distinguished between the right of a person to carry whiskey in his baggage and his right to carry it in his pocket. Held: That in the instant case the distinction was immaterial, because the defendant had in his possession more than the law allowed, even if it be conceded that having it in his pockets was equivalent to having it in his baggage. Carter *v.* Commonwealth, 810.

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INTOXICATING LIQUORS—Continued.

Harmless Error—Continued.

In a prosecution under the prohibition act, the court instructed the jury that it was unlawful for the defendant to keep or store for sale, gift or use, ardent spirits in any other place than in the *bona fidé* home of himself. This was a mere inadvertence, for it is clearly unlawful to store ardent spirits for sale, even in a *bona fide* home; but inasmuch as the error is favorable to the plaintiff in error and not against his interest, it is harmless. Pettus *v.* Commonwealth, 806.

Indictment.—An indictment under the prohibition act, in the form authorized by the statute, is not demurrable. Pettus *v.* Commonwealth, 806.

Instructions.—See *Infra* "Transportation."

Presumptions and Burden of Proof.—In a prosecution for violation of the prohibition act, if accused wishes to rely upon any matter in defense, the burden of proof rests upon him. Carter *v.* Commonwealth, 810.

Possesion of Ardent Spirits.—The *prima facie* presumption raised by section 65 of the prohibition act from the possession by any person of any ardent spirits at any place other than his home, extends no further than the presumption that such person possesses such distilled liquor *for the purpose of sale.* Such possession does not of itself furnish any evidence of any sale actually made—it being *prima facie* evidence only of the contemplated selling thereof by such possessor of the liquor. Such possession with such purpose, does, it is true, constitute in itself an offense under the statute, but it is not the offense of "selling" of which the accused was found guilty in the instant case. Collins *v.* Commonwealth, 815.

Sale of Liquor.—The *prima facie* presumption raised by section 65 of the prohibition act from the possession by any person of any ardent spirits at any place other than his home, extends no further than the presumption that such person possesses such distilled liquor *for the purpose of sale.* Such possession does not of itself furnish any evidence of any sale actually made—it being *prima facie* evidence only of the contemplated selling thereof by such possessor of the liquor. Such possession with such purpose, does, it is true, constitute in itself an offense under the statute, but it is not the offense of "selling" of which the accused was found guilty in the instant case. Collins *v.* Commonwealth, 815.

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INTOXICATING LIQUORS—Continued.

Transportation.—Where defendant was arrested in a town hall with more than a quart of whiskey on his person and he did not live in the hall, an instruction is not erroneous which assumes that defendant was transporting the whiskey. His temporary presence there with the whiskey was sufficient evidence that he was carrying it about with him. Carter *v.* Commonwealth, 810.

An indictment charged accused with unlawfully transporting more than one quart of ardent spirits and the court instructed the jury that, "You must believe beyond a reasonable doubt that he had this liquor where the law prohibits, and I have told you where he could have it and where he could get it." It was objected to this instruction that defendant was not charged in the indictment with unlawfully keeping or storing the liquor. Held: That upon this point, without conceding that the instruction, when viewed as a whole, was in any respect erroneous, it is sufficient to say that the jury found the defendant guilty, not of having or receiving the whiskey, but of transporting it contrary to law. Upon the facts stated, and in the absence of any conflict of evidence, the instruction could not have prejudiced the defendant, since he was clearly guilty of the crime of which he was convicted; and the language complained of, while it may have been surplusage, cannot be regarded as harmful error. Carter *v.* Commonwealth, 810.

Verdict.—*Evidence to Support.*—In a prosecution for violation of the prohibition act, the jury found defendant guilty of transporting and selling whiskey contrary to law. The penalty imposed by the verdict did not exceed the minimum penalty for transporting. There was no evidence to support that portion of the verdict which found the accused guilty of selling whiskey contrary to law. Held: That although the court below erred in declining to set aside that portion of the verdict which found accused guilty of selling, yet the error was harmless, since the jury imposed no penalty for that offense. Collins *v.* Commonwealth, 815.

ISSUES TO JURY.

Appeal and Error.—See *infra*, "Discretion of Court."

In the instant suits a majority of the court were of the opinion that there was sufficient evidence in the record to sustain the decree of the trial court in each of the cases, and that no issue out of chancery was necessary. Catron *v.* Norton Hardware Co., 880.

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ISSUES TO JURY—Continued.

Discretion of Court.—While directing an issue to be tried by a jury is a matter of discretion with a court of equity, it is not an arbitrary discretion, but one to be exercised upon sound principles of reason and justice. A mistake in its exercise is just ground of appeal, and the appellate court will determine whether or not it has been properly exercised in a given case. It is error to direct an issue when it should not have been exercised, and it is equally error to fail to direct one when it should have been directed. The object of the issue is to inform the conscience of the chancellor, and for this purpose he may direct it, though not requested by either party. Catron *v.* Norton Hardware Co., 380.

Respect Due to Decree of Trial Court.—The decree of the trial court is entitled to great respect, and is generally presumed to be right, but where the evidence was not taken before the trial court, but by depositions, and is conflicting, and involves not only the question of the credibility of the witnesses but the charge of fraud on the part of some of the parties who have testified in the cause, it is peculiarly a case for an issue to be tried by a jury, and if the chancellor has failed to order it, though not requested by the parties, his decree will be reversed. Catron *v.* Norton Hardware Co., 380.

JEOPARDY. See AUTREFOIS, ACQUIT AND CONVICT.

JOINDER OF CAUSES OF ACTION. See PHYSICIANS AND SURGEONS.

JOINT ADVENTURES.

Jurisdiction of Equity.—Where a vendee purchased a farm at the suggestion and through the efforts of S., and there was a prior parol agreement between the vendee and S. that the title should be taken in the vendee's name, but that the farm was to be sold, and S. in consideration of his services was to receive one-half of the proceeds of sale in excess of $8,500, S. was within his rights in invoking the aid of a court of equity to protect his interests under the contract, and the confirmation by the court of a sale effectuated by S. with one C. was within the pleadings and warranted by the evidence in the case at bar. Kincheloe *v.* Taylor, 178.

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JOINT WILLS. See WILLS.

JUDGMENTS AND DECREES.

Co-defendants.—A judgment against a party who was not served with process and against whom the suit had abated is void as to her, but not as to her co-defendants, as it is an error that can and should be corrected under section 3451 of the Code of 1904. Manor and Others *v.* Hindman, 767.

Enforcement.—*Contempt.*—The fact that a decree is final does not render the court powerless to enforce it by contempt proceedings, and such proceedings would not be a proceedure *in the cause*, which was ended, but a procedure *beyond* the cause for the enforcement of the decree. Rinehart & Dennis Co. *v.* McArthur, 556.

Final Judgments and Decrees.— See FINAL JUDGMENTS AND DECREES.

Finding of United States Court of Claims.— Calhoun *v.* Massie, 673.

Fire Insurance.— See FIRE INSURANCE.

Former Adjudication or Res Adjudicata.— See FORMER ADJUDICATION OR RES ADJUDICATA.

Partial Invalidity.—See *infra*, "Co-defendants."

Presumptions and Burden of Proof.—There is every presumption that a statement in a decree is correct. Catron *v.* Bostic, 355.

State.— See STATE.

JUDICIAL SALES. See REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Estoppel.—The owner of property which was sold at a judicial sale, having procured a modification of the terms of sale, which, in good faith, was complied with by the purchaser, was estopped from objecting to its confirmation. Hilliard *v.* Union Trust Co., 724.

Inadequacy of Price.—Where the evidence showed that the subject of a judicial sale brought a good price, the testimony of a witness at a subsequent time that he would give a larger price for the property was insufficient to overbalance it. The offer having been made under changed conditions, after the subject of the sale had advanced in price, and the witness having been a bidder at the former sale. Hilliard *v.* Union Trust Co., 724.

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JUDICIAL SALES—Continued.

Modification of Terms of Sale.—See *infra*, "Estoppel."

Setting Aside.—*Inadequacy of Price.*—Where the question before the trial court is the confirmation or setting aside of a judicial sale for alleged inadequacy of price, *ex parte* affidavits of landowners living in the vicinity, all of whom stated that the price was a fair one, may be considered by the court in opposition to the opinion of the commissioner that the price was inadequate. Lillard *v.* Graves, 193.

A judicial sale regularly and fairly made in compliance with the decree of sale, will not be disturbed upon the bare suggestion of inadequacy of price. Lillard *v.* Graves, 193.

In the case at bar, it was error for the circuit court to set aside a judicial sale upon the opinion of the commissioner who made the sale, that the price obtained for the land was inadequate, wholly unsupported by evidence, against the presumption in favor of the highest bid as a just criterion of the value of the property, and the uncontradicted evidence afforded by the affidavits of fourteen responsible citizens and landowners, whose property either adjoined or lay in the immediate vicinity of the land in controversy, that it brought a fair price. Lilliard *v.* Graves, 193.

It is error to set aside a judicial sale solely because after the sale an advanced bid of ten per cent. has been made. Lillard *v.* Graves, 193.

Unsecured Debts.—Real estate of a debtor cannot be sold to pay his unsecured debts. A court of equity has no such power. Catron *v.* Bostic, 355.

JURISDICTION.

Equity.—*Discovery.*—See DISCOVERY.

Dismissal.—Whenever it is brought to the attention of a court of equity, or it discovers that a bill does not state a case proper for relief in equity, it will dismiss it, though no objection was taken to the jurisdiction by the defendant in his pleadings. The want of equity is the want of jurisdiction in such case, and though the defendant took no notice of the defect but defended on the merits, and the case was heard and decided on the merits, the Supreme Court of Appeals will reverse and dismiss where there is such lack of jurisdiction. Catron *v.* Bostic, 355.

Joint Adventures.—Where a vendee purchased a farm at the suggestion and through the efforts of S., and there

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JURISDICTION—Continued.

Equity—Continued.

Joint Adventures—Continued.

was a prior parol agreement between the vendee and S. that the title should be taken in the vendee's name, but that the farm was to be sold, and S. in consideration of his services was to receive one-half of the proceeds of sale in excess of $8,500, S. was within his rights in invoking the aid of a court of equity to protect his interests under the contract, and the confirmation by the court of a sale effectuated by S. with one C. was within the pleadings and warranted by the evidence in the case at bar. Kincheloe *v.* Taylor, 178.

Lost Instruments and Records.—See LOST INSTRUMENTS AND RECORDS.

Probate of Wills.—Courts of equity have no inherent jurisdiction to set aside wills on the ground of fraud, undue influence, or lack of testamentary capacity on the part of the testator. Jurisdiction of these questions is to be found solely in the statute on the subject. Code 1904, section 2544. Queensbury *v.* Vial, 219.

Title and Boundaries of Land.—The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. But where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever, indeed, the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury. Cumbee *v.* Ritter, 448.

In a suit to enjoin a trespass on land in cutting and removing timber, where both parties claim title and possession and both are exercising acts of ownership, and one fails to establish even a *prima facie* case in the interest of peace, law and order an equity court should take jurisdiction; and in the instant case the trial court properly determined the question raised against the defendant's contention, which rests upon a claim of title, which is entirely unsustained, if not negatived, by the evidence introduced to support it. Cumbee *v.* Ritter, 448.

Injunctions.—See INJUNCTIONS.

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JURISDICTION—Continued.

Relative Jurisdiction of State and Federal Courts.—Where the State court and United States court both have jurisdiction of a person accused of crime, the tribunal that first takes jurisdiction retains it to the exclusion of the other, until its duty with respect to the matter has been fully discharged and the jurisdiction exhausted. The rule applies both to civil and criminal cases. Bowling *v.* Commonwealth, 340.

If a person is in the actual custody of the United States for a violation of its laws, no State can by *habeas corpus*, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State, is, by express enactment, beyond the reach of the federal courts or judges. Judiciary act, section 14; act March 2, 1833, section 7; 4 Stat. at Large, 634. Bowling *v.* Commonwealth, 340.

JUS DISPONENDI. See WILLS.

JUSTICES OF THE PEACE.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

LABOR.

Labor Agents.—In Watts *v.* Commonwealth, 106 Va. 851, 56 S. E. 223, Ann. Cas. 1914 B, 738, it was held that the act (Appendix Virginia Code 1904, page 2247), prohibiting labor agents from conducting their business without obtaining a license, did not prohibit any person, or the agent of any person, who needed men for his own work from hiring them without paying a license; and it would seem that the effect of the statute in that respect has not been changed by the amendment of 1916 (Acts 1916, page 880). Clinchfield Coal Corp. *v.* Redd, 420.

LACHES.

Nuisances.—See NUISANCES.

LANDLORD AND TENANT.

Injury to Person in Street.—Where a boy was rightfully in a street and was injured by the fall of a large gate, the falling of the gate being caused by negligent construction under the supervision of the landowners, the landowners are liable, and the fact that the premises were in the exclusive

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LANDLORD AND TENANT—Continued.

Injury to Person in Street—Continued.

possession of a tenant was immaterial, the owners themselves having created the danger. The case is different if the tenant himself, without the authority or knowledge of the owner, creates a dangerous condition. King *v.* Hartung, 185.

A property owner is bound at his peril to see that his premises are safe as to persons using the street upon which the premises abut. King *v.* Hartung, 185.

Things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident. King *v.* Hartung, 185.

Where a boy rightfully in a street is injured by a gate which opened out into the street falling upon him, the owner of the premises upon which the gate is situated is liable for injuries to the boy, although the gate was erected by an independent contractor and its fall was due to negligence in construction. King *v.* Hartung, 185.

In actions for injuries to passengers in streets, there is no reason for a distinction between the case of an awning projecting over a street and the case of any other part of a building, which, though not projecting over the street, is liable to fall upon it. King *v.* Hartung, 185.

LAST CLEAR CHANCE.

Carriers of Passengers.—In the instant case, an instruction upon the theory that the doctrine of discovered peril or the last clear chance might be applied by the jury was clearly erroneous, as appears from all of the accounts given of the accident by the plaintiff himself. It is manifest that if he was struck just as he stepped from his engine, there was no opportunity to save him from the consequences of his own negligence. It is equally evident that while a part of his body was across the rail and his head under the engine, a large part, if not all, of his body must have been concealed by the overhang of the tender and freight cars from the engineer of the approaching train on the parallel track, and that when he suddenly got up from under the engine in front of the passanger train by which he was immediately struck there was then no possible chance to save him from the consequences of his own negligence. Pennsylvania R. Co. *v.* Jenkins, 211.

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LAW OF THE CASE.

If there have been two appeals of a case, between the same parties, and the facts are similar, nothing decided on the first appeal can be re-examined on the second appeal. Pennsylvania R. Co. *v.* Jenkins, 211.

LEGISLATURE. See CONSTITUTIONAL LAW.

LICENSES.

Bakers.—See HAWKERS AND PEDDLERS.

Hawkers and Peddlers.—See HAWKERS AND PEDDLERS.

Labor Agents.—In Watts *v.* Commonwealth, 106 Va. 851, 56 S. E. 223, Ann. Cas. 1914 B, 738, it was held that the act (Appendix Virginia Code 1904, page 2247), prohibiting labor agents from conducting their business without obtaining a license, did not prohibit any person, or the agent of any person, who needed men for his own work, from hiring them without paying a license; and it would seem that the effect of the statute in that respect has not been changed by the amendment of 1916 (Acts 1916, page 880). Clinchfield Coal Corp. *v.* Redd, 420.

LIMITATION OF ACTIONS.

Nuisances.—See NUISANCES.

Waiver of Statute of Limitations.—See STATUTES.

LIS PENDENS.

Notice of Suit.—Where the purchaser of a farm had both actual and constructive notice of a suit against the vendor, and of the rights and equities in the farm of the complainant in that suit, he took the property subject to any decree which might be rendered in the suit with respect to the property, and the broker who negotiated the sale with actual and constructive notice of the pending suit occupied no higher ground than the purchaser. Kincheloe *v.* Taylor, 178.

LOST INSTRUMENTS AND RECORDS.

Jurisdiction of Equity.—While courts of equity have jurisdiction to set up lost deeds and wills and to establish titles under them, the proof of the former existence, the loss and the contents of the instrument, should be strong and conclusive before the courts will establish a title by parol tes-

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LOST INSTRUMENTS AND RECORDS—Continued.

Jurisdiction of Equity—Continued.

timony to property which the law requires shall pass only by deed or will. This, however, is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised nor except upon the clearest and most stringent proof. Branham *v.* Clinchfield Coal Corp., 346.

In the instant case it was contended that there was a sale of the tract of land in question to the predecessor in title of the appellee by title bond or deed, and that the bond or deed had been lost or destroyed. The alleged transaction occurred twenty-eight years before the institution of the instant suit, and has been obscured by lapse of time and loss of evidence from death of parties and other causes. The evidence was voluminous and irreconcilably conflicting on the material issues, and fell far short of establishing the alleged sale, either by title bond or deed, and the loss of those instruments, with that strong and conclusive evidence that the law requires. Branham *v.* Clinchfield Coal Corp., 346.

Proof to Establish.—See *infra*, "Jurisdiction of Equity."

MALICE. See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

Advice of Counsel.—Advice of counsel, to avail as a defense, must have been sought and obtained before the prosecution is begun, must be based upon a full statement of the facts to counsel, and must be acted upon by the defendant. Clinchfield Coal Corp. *v.* Redd, 420.

The true purpose for which advice of counsel may be shown in defense of an action for malicious prosecution would seem to be to establish probable cause; and the test of probable cause is to be applied at the time the action complained of was taken. Clinchfield Coal Corp. *v.* Redd, 420.

In order that legal advice may be used as a shield against a suit for malicious prosecution, it must be given by "a person accepted and licensed by the courts as one learned in the law and competent to be adviser to clients and to the court." Clinchfield Coal Corp. *v.* Redd, 420.

In the instant case there was nothing at all in the record to indicate that either the special officer or the superintendent of defendant company deferred in any way to the

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MALICIOUS PROSECUTION—Continued.

Advice of Counsel—Continued.

advice and judgment of the justice who issued the warrant, and if they had done so, his advice would not have constituted a legal defense to the action. Clinchfield Coal Corp. *v.* Redd, 420.

Agency.—See *infra*, "Instructions."

Burden of Proof.—The burden of proving that there was no probable cause is upon the plaintiff. Va. R. & P. Co. *v.* Klaff, 260.

The burden of proof, where a prosecution is instigated by an officer who is also an employee of defendant, is in every case upon the plaintiff to overcome the presumption that the officer was acting solely in his official capacity; but in the instant case there was evidence to justify the jury in finding for the plaintiff on that issue. Even if it be conceded that the prosecution originated in a purely official act on the part of the special agent, the jury might well have found the verdict upon the theory of the defendant's subsequent approval and ratification. Clinchfield Coal Corp. *v.* Redd, 420.

Declaration.—Where a declaration contained three counts, neither of which consisted of the single charge of false arrest and imprisonment, and the gravamen of each count rested upon a charge of malicious prosecution, and the case below was proceeded with by court and counsel as an action for malicious prosecution, the Supreme Court of Appeals will deal with the case as an action for malicious prosecution. Clinchfield Coal Corp. *v.* Redd, 420.

Detective.—See *infra*, "Officers of the law."

The person who arrested plaintiff was not on defendant company's payroll. The company paid a detective agency for his services and the agency paid him a salary. But it appeared from the evidence that he looked to the defendant for his instructions, was subject to its orders and directions, and that his principal business was to carry out the wishes and the purposes and policy of the defendant company in connection with the preservation of order and the enforcement of law at its plant, and in the instant case he did not procure or ask for a warrant until after a conference with defendant's superintendent. Held: That the relationship of master and servant was established between defendant company and the person causing the arrest of plaintiff, and that the independent contractor doctrine did not apply. Clinchfield Coal Corp. *v.* Redd, 420.

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MALICIOUS PROSECUTION—Continued.

Elements to Sustain Action.—In order to sustain an action for malicious prosecution, it must be alleged and proved that the prosecution was set on foot by the defendant, and that it has terminated in a manner not unfavorable to the plaintiff; that it was instituted or procured by the co-operation of the defendant; that it was without probable cause; and that it was malicious. Clinchfield Coal Corp. *v.* Redd, 420.

Exemplary Damages.—In view of the evidence in the instant case an instruction that the jury if they believe that the acts complained of were committed with actual malice and a design to injure or oppress the plaintiff, might assess punitive or exemplary damages, was not erroneous. Clinchfield Coal Corp. *v.* Redd, 420.

Independent Contractor.—See *infra*, "Detective."

Instigation of Prosecution by Defendant.—There can be no malicious prosecution without the machinery of the law, and it is, therefore, of course true that the officers of the law must be the final and effective actors. The question in every case is, was the prosecution instigated or brought about by the co-operation of the defendant? Such instigation or co-operation may be chargeable to the defendant from original steps taken by him to incite the prosecution, or from subsequent adoption and ratification by him of steps which had already been taken or instigated by others. Clinchfield Coal Corp. *v.* Redd, 420.

The instant case was submitted to the jury upon two theories—first, that the injury complained of was done by the servant of the defendant in the course of his employment, and, second, that the defendant subsequently ratified and continued the prosecution, and there was sufficient evidence to support the verdict of the jury upon either or both of these theories. Clinchfield Coal Corp. *v.* Redd, 420.

Instructions.—*Disavowal of Act of Agent.*—In an action for malicious prosecution the jury were instructed that if they believed from the evidence that the defendant company did not at first set on foot the arrest and prosecution of the plaintiff, yet if they believed that the defendant company, through its superintendent did not disavow the act at once, when it came to its knowledge, but ratified the act and continued the prosecution without probable cause, such continued arrest and prosecution is equivalent to precedent authority. Held: Not improper under the facts of the

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MALICIOUS PROSECUTION—Continued.

Instructions—Continued.

case as demanding an immediate disavowal before the defendant had come into the possession of all the facts. Clinchfield Coal Corp. *v.* Redd, 420.

Instructions Are to Be Read Together.—In an action for malicious prosecution, an instruction that malice may be inferred from want of probable cause, standing alone, might have constituted reversible error. But instructions are to be read as a whole, and the instruction in question itself told the jury in effect that the burden was on the plaintiff to establish by a preponderance of the evidence, not only the negative proposition that the prosecution was instituted without probable cause, but also that it was malicious; and another instruction precluded any probability of a misapprehension in this respect on the part of the jury. Clinchfield Coal Corp. *v.* Redd, 420.

Justice of the Peace, Refusal to Prosecute before.— See *infra*, "Malice."

Law Favors Prosecution for Crime.—The law favors prosecution for crime, but this principle and policy of the law does not go to the extent of inviting the prosecution of citizens who are keeping within their rights merely because some other citizen may have an impression that there is reason to institute a prosecution. The protection which the law extends to the prosecutor depends (1) upon the existence of "such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected," and (2) upon the prosecutor's *acting* "upon such belief and expectation." Clinchfield Coal Corp. *v.* Redd, 420.

Malice.—In the instant case counsel for the plaintiff insisted that malice was shown because the railroad's counsel refused to institute a prosecution before a justice of the peace, although urged to do so by the Commonwealth's attorney, where the plaintiff, upon the hearing, might have made a sufficient explanation. Held: That the defendant, whether actuated by malice or prudence, had the right to decline to take the entire responsibility for instituting the prosecution and, after disclosing the facts, to leave that responsibility with the Commonwealth's attorney and the grand jury. And, therefore, the insistence of defendant's attorneys, who were sustained in their position by the judge of the court that the matter be brought before a grand jury, was of little conse-

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MALICIOUS PROSECUTION—Continued.

Malice—Continued.

quence in showing malice on the part of defendant. Moreover, if the facts shown by the record in this case had been submitted to a justice of the peace, it would have been the duty of the justice to send the case to the grand jury. Va. R. & P. Co. *v.* Klaff, 260.

Questions of Law and Fact.—Malice may be, and generally is, inferred from want of probable cause, though, it is said, it is not a necessary inference. It is always a question for the jury under all the circumstances of the case. Clinchfield Coal Corp. *v.* Redd, 420.

Want of Probable Cause.—In an action for malicious prosecution malice may be implied from the want of probable cause if the circumstances will warrant the implication, but the existence of malice may be repelled by the circumstances, though there was not good ground for the prosecution, and in such cases the action will not lie. Clinchfield Coal Corp. *v.* Redd, 420.

Master and Servant.—See *infra*, "Burden of Proof;" "Detective."

Selection of the servant, payment of wages, power of dismissal, and particularly the power of control, are circumstances to be considered, and are usually decisive, in determining the relation of master and servant; but where the work to be done involves the exercise of personal and non-assignable legal duties, no individual or corporation can escape the doctrine of *respondeat superior* by transferring to third persons the selection and payment and the power of dismissal and control of the servant. The owner of an operation or enterprise cannot, by securing through others special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity from liability for malicious prosecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal. When he undertakes these functions, his duties are personal and non-assignable, and where he arranges for and accepts the service, he will not be permitted to say that the relationship of master and servant does not exist. Clinchfield Coal Corp. *v.* Redd, 420.

Officers of the Law.—See *infra*, "Burden of Proof;" "Detective;" "Instigation of Prosecution by Defendant;" "Ratification of Act of Agent."

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MALICIOUS PROSECUTION—Continued.

Officers of the Law—Continued.

Officer Agent of Defendant.—The fact that the party who arrested plaintiff was an officer, however, did not preclude him from acting also in the capacity of an agent of the defendant. The employment of special agents, who are clothed with police powers, is a common and well-known practice among mining, manufacturing and transportation companies. Clinchfield Coal Corp. *v.* Redd, 420.

Presumptions and Burden of Proof.—See *infra*, "Burden of Proof."

Probable Cause.—An action for malicious prosecution cannot be maintained unless it appears that the prosecution was instituted without probable cause. Va. R. & P. Co. *v.* Klaff, 260.

The burden of proving that there was no probable cause is upon the plaintiff. Va. R. & P. Co. *v.* Klaff, 260.

If there is no conflict in the evidence, the existence or non-existence of probable cause is a question of law for the court. Va. R. & P. Co. *v.* Klaff, 260.

Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected. Public policy requires that persons justly suspected of crime should be fairly prosecuted. Va. R. & P. Co. *v.* Klaff, 260.

It is reprehensible to institute criminal prosecutions lightly and thus to injure the character of honest men, but it should be constantly borne in mind that, in the interest of good order and society, those who have honest reason to believe that crimes have been committed and have knowledge of facts sufficient to justify such belief, ought not to be deterred from their public duty by the fear of having a jury assess damages against them if the accused should be acquitted. The courts, in the public interest, should maintain unimpaired the doctrine that the existence of probable cause is a complete defense to an action for malicious prosecution. Va. R. & P. Co. *v.* Klaff, 260.

In the case at bar, plaintiff, a junk dealer, was indicted under section 3715, Code of 1904, charged with having bought and received railroad brass and metal, the property of the defendant railroad company. There was also a count in the indictment charging him with the larceny of the property. The uncontradicted facts in the case clearly showed the existence of probable cause for the prosecution of plaintiff. A licensed junk dealer who receives recently stolen

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MALICIOUS PROSECUTION—Continued.

Probable Cause—Continued.

property, or who buys brass in violation of section 3715, may not escape just suspicion by merely showing, as the plaintiff here did, that he was frank, concealed no fact within his personal knowledge, and that he did not personally receive such goods. If he closes his eyes to the criminal or suspicious acts of his subordinates and employees, and accepts the benefit of such services to him, while he may, as in this case, upon his trial, secure an acquittal, he ought not to expect to escape prosecution. Va. R. & P. Co. *v.* Klaff, 260.

Case at Bar.—In the instant case the evidence did not show that there was probable cause for the prosecution of plaintiff. The facts, which are not disputed, did not warrant it, and the general superintendent of the defendant, who, as the jury had the right to find, and did necessarily find, authorized or ratified the proceeding, did not claim to have any fixed opinion or belief as to the plaintiff's guilt. Clinchfield Coal Corp. *v.* Redd, 420.

Definition.—Probable cause is knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected. Clinchfield Coal Corp. *v.* Redd, 420.

Issuance of Warrant or Finding of Indictment.—The issuance of a warrant or the finding of an indictment does not constitute conclusive proof of probable cause. Whether the issuance of the warrant constitutes *prima facie* evidence of probable cause is an immaterial question, since the burden is always on the plaintiff to negative the existence of such cause, and the provisions of section 3955 of the Code of 1904, giving a certain discretion to magistrates in the issuance of warrants in criminal cases, do not add anything to the general law of evidence in suits for malicious prosecution. Clinchfield Coal Corp. *v.* Redd, 420.

Malice.—In an action for malicious prosecution malice may be implied from the want of probable cause if the circumstances will warrant the implication, but the existence of malice may be repelled by the circumstances, though there was not good ground for the prosecution, and in such cases the action will not lie. Clinchfield Coal Corp. *v.* Redd, 420.

Mistaken Belief.—There may be circumstances under which a mistaken belief in a legal proposition, like a mistaken belief in the existence of facts, would afford ground for a

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MALICIOUS PROSECUTION—Continued.

Probable Cause—Continued.

Mistaken Belief—Continued.

prosecutor to claim probable cause as a defense in an action for malicious persecution; but such belief must be positive and definite. A confessedly doubtful state of mind will not suffice, either as to the facts or the law. Clinchfield Coal Corp. *v.* Redd, 420.

Questions of Law and Fact.—What is probable cause as an abstract legal proposition is a question for the court; but where there is any conflict of evidence it is for the jury to determine whether in the particular case such probable cause existed. Clinchfield Coal Corp. *v.* Redd, 420.

Questions of Law and Fact.—See *infra*, "Malice;" "Probable Cause."

If there is no conflict in the evidence, the existence or non-existence of probable cause is a question of law for the court. Va. R. & P. Co. *v.* Klaff, 260.

Ratification of Act of Agent.—Whether the special officer in arresting plaintiff and making an assault upon him, was acting within the scope of his employment by the defendant, there can be no doubt that he intended what he did for the benefit of the defendant; and the subsequent continuance of the prosecution by the superintendent of defendant, with knowledge of what had gone before, brings the case clearly within the principle of ratification. Clinchfield Coal Corp. *v.* Redd, 420.

Termination of Prosecution in Favor of Plaintiff.—The dismissal of a warrant without a trial at the instance of the defendant was a sufficient termination of the prosecution in favor of plaintiff to enable him to maintain an action for malicious prosecution. Clinchfield Coal Corp. *v.* Redd, 420.

MALPRACTICE. See PHYSICIANS AND SURGEONS.

MANDAMUS.

Action on Official Bond.—In a number of instances mandamus against public officers to enforce the payment of funds in their hands has been refused because the party applying for the writ had not exhausted his remedy on the officer's official bond. But the mere fact that a party has a remedy by an action on the official bond of an officer, however, will not alone bar relief by mandamus. Such a remedy may be far from adequate and complete. Rinehart & Dennis Co. *v.* McArthur, 556.

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MANDAMUS—Continued.

Adequate and Complete Remedy.—See *infra*, "Remedy at Law."

Answer.—In the instant case, defendant in error filed his petition for a mandamus against the clerk of court to compel payment by the clerk to him of a sum of money in the hands of the clerk. The clerk answered, disclaiming any interest in the fund, and offering to bring the money into court for its disposition, but alleging that the fund was claimed by the plaintiff in error as assignee of the defendant in error, and asking that his "answer may be treated as an interpleader." On exception to this answer, the court refused to accept it as an answer to the petition, but accepted it as a statutory interpleader under section 2998, Code of 1904, and allowed the plaintiff in error to come in by petition and assert its claim to the fund. Even if it be conceded that section 2998, Code of 1904, applies to a petition for a mandamus, the answer of the clerk did not comply with the requirements of that section, and the circuit court erred in directing it "to be treated as an interpleader." There was no reason, however, why the answer should not have been treated as an answer to the petition for the mandamus. Rinehart & Dennis Co. *v.* McArthur, 556.

In mandamus proceedings, under sections 3011-3021, Code of 1904, it would seem that any defense may be made which shows that the petitioner is not entitled to the writ prayed for. If, as in the instant case, the defendant is the mere custodian of a fund, in which he claims no interest, but which is in good faith claimed by another, there is no good reason, under the liberal provisions of the new procedure, why the claimant should not be admitted as a party, and the rights of the parties thus speedily determined in the mandamus proceeding. Rinehart & Dennis Co. *v.* McArthur, 556.

Appeal and Error.—Objection cannot be made in the appellate court to the awarding of a mandamus where not mentioned in the petition for the writ of error. Rinehart & Dennis Co. *v.* McArthur, 556.

Collection of Debts.—The writ of mandamus is an extraordinary legal remedy designed to meet emergencies and prevent a failure of justice, and is not designed as a remedy to enforce the collection of debts. Rinehart & Dennis Co. *v.* McArthur, 556.

Mandamus cannot be used to enforce mere contractural obligations between private persons, nor, as a general rule, can it be used to enforce the collection of a mere money de-

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MANDAMUS—Continued.

Collection of Debts—Continued.

mand from a public officer if the creditor has a full, adequate and complete remedy by an ordinary action at law. Rinehart & Dennis Co. *v.* McArthur, 556.

Debts.—See *infra*, "Collection of Debts."

Defenses.—See *infra*, "Answer."

Elections.—*Certificates of Election.*—Under section 137 of the Code of 1904, it was the plain duty of the county clerk to immediately make out a certificate of election to petitioner, in the case at bar, as mayor of the town of Dillwyn, and deliver the same to him, and on request of petitioner therefor, the clerk having failed and refused to do so without good cause, the writ of mandamus prayed for by petitioner should be awarded. Gregory *v.* Hubard, 510.

Interpleader.—See *infra*, "Answer."

Jurisdiction.—See *infra*, "Officer of Court."

Objections Ex Mero Motu.—Where the trial court has jurisdiction of the subject matter, objection to a mandamus, if available, cannot be noticed by the court *ex mero motu.* Rinehart & Dennis Co. *v.* McArthur, 556.

Officer of Court.—In the case at bar, a decree directed to the clerk of the court to pay over to defendant in error a certain sum deposited by defendant in error with the clerk to abide the decree. This the clerk refused to do because the same was claimed by the plaintiff in error under an alleged equitable assignment. Thereupon defendant in error applied for a writ of mandamus against the clerk to compel the payment, and the writ was awarded him. Although mandamus did not afford, and could not have afforded any greater relief than the petitioner could have obtained by applying for contempt proceedings, yet as the trial court had jurisdiction by mandamus to compel its officer to do a merely ministerial act, concerning which he had no discretion, the proceeding by mandamus was not *per se* either void or voidable, and as no objection was raised to it in the trial court, by demurrer or otherwise, its award is not assignable error on appeal. Rinehart & Dennis Co. *v.* McArthur, 556.

Public Officers.—See *infra*, "Action on Official Bond;" "Collection of Debts:" "Officer of Court."

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MANDAMUS—Continued.

Public Officers—Continued.

Ministerial and executive officers, in the course of their official conduct, are construing statutes every day, and yet if, in consequence of their misconstruction, they fail to discharge their duties they may be compelled to do so. City of Roanoke *v.* Elliott, 393.

The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. While it is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus* the practice of trying title to office by mandamus in Virginia is sustained by a line of decisions covering over a century of the State's judicial history, and it is now the well-settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases. City of Roanoke *v.* Elliott, 393.

Purpose of Writ.—See *infra*, "Collection of Debts."

Remedy at Law.—See *infra*, "Action on Official Bond."

The question in mandamus proceedings is not whether the applicant has a remedy at law, but is that remedy adequate and complete. The other remedy is not adequate where it involves tedious and expensive litigation, or suits against third persons, or is obsolete and inoperative, or does not afford relief upon the very subject matter of litigation. It is not complete where it leaves unperformed the very act the performance of which is sought by the writ. There are also other instances where the remedy at law is not adequate and complete. But where an ordinary action at law will afford the applicant full, adequate, complete and speedy relief, mandamus as a general rule does not lie. Rinehart & Dennis Co. *v.* McArthur, 556.

Where money is in the hands of an officer of the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer. Rinehart & Dennis Co. *v.* McArthur, 556.

Right to Writ.—See *infra*, "Writ Unnecessary."

Writ Unnecessary.—It appeared that petitioners for a mandamus to compel a county clerk to issue them certificates of election as members of a town council had already qualified as members of the council. Held: That as the council was

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MANDAMUS—Continued.

Writ Unnecessary—Continued.

the judge of the election, qualification and returns of its members by section 1030, Code of 1904, the object of the petition had been accomplished, and the mandamus will be refused. Gregory *v.* Hubard, 510.

MAPS. See BOUNDARIES.

MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT. See FELLOW-SERVANTS.

Assumption of Risk.—Assumption of risk is a matter of contract, while contributory negligence is a matter of conduct. This distinction, however, has not always been observed in the application of the law to the facts of particular cases. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

By the contract of service, the servant impliedly assumes the risk of all dangers that are naturally and normally incident to that service, and not due to the master's negligence. The servant also assumes, by his contract of service, the dangers thereafter arising in the course of his employment which becomes known to him, or which by the exercise of ordinary care on his part ought to become known to him, including all open and obvious dangers. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

If an assistant foreman, in the discharge of a non-assignable duty, assured the plaintiff, a lineman, that a wire was dead, there was nothing upon which the doctrine of assumed rick or shifting conditions could rest. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

As to dangers arising after entering into a contract of service, it is the duty of the servant to bring them to the attention of the master and ask their removal, and if the master refuses to remove them, the servant should quit the service; but if he fails to notify the master, and continues in the service when he knows or ought to know of the danger, he thereby assumes the risk. It is a part of his contract of service that he will thus assume such risks. He impliedly agrees at the time of entering into the contract of service that, as to such dangers, he will either report them and have them remedied, or else will assume the risk of them, if he continues in the service. As to this class of dangers,

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MASTER AND SERVANT—Continued.

Assumption of Risk—Continued.

the rule is the same whether the master be guilty of negligence or not. Houston's Adm'x *v.* Seaboard A. L. Ry. 290.

In order to charge the servant, however, with the assumption of the risk of dangers, they must be so patent as to be instantly recognized by persons familiar with the business and accustomed to the service. The particular injury sustained need not have been apprehended nor the danger thereof fully realized, but the servant must know and appreciate the fact that the service in which he is about to engage involves the risk of danger to him, or be chargeable with such knowledge, before he can be held to have assumed it. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

If the servant has full knowledge of all the physical conditions, he is chargeable with knowledge of all the resulting dangers proximately resulting therefrom which would be obvious to a man of ordinary care and prudence. He need not have had in mind at the time he assumed the risk the particular danger which subsequently resulted in his injury. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

The general rule is well settled that where the master and servant are possessed of equal knowledge, or means of knowledge, of defects or dangers, or where they are equally ignorant thereof, the servant assumes the risk; and the same is true *a fortiori* where the servant has better means of knowledge than the master. But if the master knows, or is under an obligation to know, of dangers of which the servant is ignorant, and of which he is not under an equal obligation to know, there is no assumption of risk. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

Plaintiff's intestate, an experienced boiler-maker, was directed to make repairs in an oil tank car. He found the tank car closed when he came to do his work. He knew that it had not been ventilated, but took no steps to ventilate it, though the facilities therefor were readily at hand. He also knew from the experience of others that it was not safe to enter it. At least two persons reported a very strong and pungent odor in the car, and while he did not know that it had been transported in the car, yet the character of the car itself was an advertisement to him of what had probably been transported in it—that is, either oil, gasoline or something of that kind. He was chargeable with notice of the fact, which is common knowledge, that if oil is left in a car of this kind, tightly closed, gases are likely to

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MASTER AND SERVANT—Continued.

Assumption of Risk—Continued.

arise, and that such gases are inflammable. His own senses must have informed him of the presence of gas in the car, and while the witnesses testified that they did not know the nature of the gases, or that they were inflammable, still he was chargeable with knowledge of facts sufficient to show that it was dangerous to bring fire into contact with the contents of the car. This danger was patent, open and obvious, and when he directed a red hot rivet to be dropped into the tank, he assumed the risk of the consequences. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

Instructions.—In an action by a servant against his master for injuries sustained by the servant in the course of his employment, it is reversible error, where the defense was the assumption of the risk by the servant, for the trial court, upon the request of defendant, to refuse instructions on the assumption of risk. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

In an action by a servant against his master for injuries sustained by the servant in the course of his employment, it is reversible error, where the defense was the assumption of risk by the servant, for the trial court to give a series of instructions directing a verdict for the plaintiff, if defendant was guilty of negligence, where each of the instructions entirely ignored the defense of assumption of risk. E. I. DuPont, Etc., Co., *v.* Hipp, 49.

Knowledge of Servant.—An employee who knows of the unsafe condition of the place in which he is working, or who by the exercise of ordinary care might know the same, is not compelled to continue his work, but if he does so continue it in such place, under such conditions, he assumes such risks as are ordinarily incident to the service in which he is engaged, and also such risks as become known to him during the progress of the work, or which might have been ascertained by him in the exercise of ordinary care. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

Scaffold.—Plaintiff, an experienced carpenter, was engaged in roofing, fastening metal sheets on a roof from the under side, standing on a scaffold or platform. The scaffold rested on two steel rods. These rods had been freshly painted, and plaintiff was injured by a fall occasioned by one end of the scaffold slipping from the rod which supported it, when he was preparing to move the same. Plain-

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MASTER AND SERVANT—Continued.

Assumption of Risk—Continued.

Scaffold—Continued.

tiff had been directed by his foreman to work upon the scaffold notwithstanding that the paint was wet. Held: That the master was not liable. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

The accident, if caused by the wet paint, was most unusual and proper care does not require the anticipation of unusual events or make an employer insurer against all accidents. To make the employer responsible there must be negligence, and negligence is the doing or failing to do some act which a person of ordinary prudence could foresee would naturally and probably cause the injury complained of. If on the one hand it is assumed, as in fairness it must be, that the plaintiff, with his knowledge and experience, did not realize that the risk was increased by fresh paint, it must also be assumed that the defendant did not realize such increased danger, if any. If, on the other hand, the view is taken which was urged for the plaintiff, that the defendant must be charged with knowledge of such increased risk, then it must also be concluded that the plaintiff also knew of it, and in that event it follows inevitably that he assumed that risk. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

Contributory Negligence.—Assumption of risk is a matter of contract, while contributory negligence is a matter of conduct. This distinction, however, has not always been observed in the application of the law to the facts of particular cases. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

In the instant case, plaintiff, a miner, was not guilty of contributory negligence in resuming work upon the promise of the mine foreman that he would have the place made safe, and the assurance of the slate men that the defects had been remedied. Jewell Ridge Coal Corp. *v.* Keen, 514.

Damages.—In an action by a servant against her master for injury, the plaintiff, if entitled to recover, is unquestionably entitled to have the jury consider the amount of medical expenses incurred in consequence of her injury, but as the aggregate of those expenses were entirely within the knowledge of her physicians and herself, the jury should not have been instructed to allow for such expenses claimed in the declaration, in the absence of evidence from which they might with some degree of certainty ascertain the amount thereof. Where a plaintiff expects to recover therefor,

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MASTER AND SERVANT—Continued.

Damages—Continued.

they should be established by reasonable and proper proof. Dreyfus & Co. *v.* Wooters, 42.

Declaration.—In an action by a servant against his master for personal injuries, where the negligence of the defendant is sufficiently alleged in the declaration, and the general charge of negligence is followed by the averment, "and without any fault on the part of the plaintiff," the declaration is sufficient. The question, whether plaintiff was guilty of any such negligence, whether common law or statutory, as would preclude a recovery was matter not of averment, but of defense. Jewell Ridge Coal Corp. *v.* Keen, 514.

Duty to Warn or Instruct Servant.—*Visible Dangers.*—The master is not under an obligation to warn an adult servant of sound mind of the existence of dangers that are visible to men of ordinary intelligence, and has the right to assume, in the absence of evidence to the contrary, that his servant has ordinary intelligence and capacity, and is possessed with the instinct of self-preservation; and the general rule that the master must exercise ordinary care to provide his servant with a place reasonably safe in which to work does not apply to a place which is constantly changing by reason of the work then being done, nor does it apply where the very work which the servant is employed to do consists in making a dangerous place safe. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

Electricity.—If a servant, an experienced lineman, working about highly charged wires of the defendant daily and knowing how to handle them, was ordered by his foreman to kill a wire, without any assurance whether the current was on or off, he could not recover where he took hold of the wire with his naked hand and was injured. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Servant relying on vice-principal's statement that current had been cut off. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Fellow Servants.—See FELLOW SERVANTS.

Independent Contractors.—See INDEPENDENT CONTRACTORS.

Instructions.—See *infra*, "Assumption of Risk."

Knowledge of Servant.—See *infra*, "Assumption of Risk."

Malicious Prosecution.—See MALICIOUS PROSECUTION.

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MASTER AND SERVANT—Continued.

Malicious Prosecution—Continued.

Selection of the servant, payment of wages, power of dismissal, and particularly the power of control, are circumstances to be considered, and are usually decisive, in determining the relation of master and servant; but where the work to be done involves the exercise of personal and non-assignable legal duties, no individual or corporation can escape the doctrine of *respondeat superior* by transferring to third persons the selection and payment and the power of dismissal and control of the servant. The owner of an operation or enterprise cannot, by securing through others special agents, even though they be officers of the law, for the prosecution of offenders around the plant, obtain any immunity from liability for malicious presecutions which such owner would not be equally entitled to if he himself directly selected and paid the agents and expressly retained the power of control and removal. When he undertakes these functions, his duties are personal and non-assignable, and where he arranges for and accepts the service, he will not be permitted to say that the relationship of master and servant does not exist. Clinchfield Coal Corp. *v.* Redd, 420.

Mines and Minerals.—*Propping.—Acts 1912, section 13, page 427.*—Acts of 1912, section 13, page 427, provides that it shall be the duty of each miner to properly prop and secure his place so as to make it secure for him to work therein. In case at bar, as soon as plaintiff was apprised of the fact that a dangerous condition had arisen at his place of work, in obedience to a positive rule of the defendant, he immediately ceased work, vacated the working place and reported the facts to the mine foreman. That official, upon inspection, determined that the situation did not call for the use of props, but that the loose slate and rock should be taken down, and ordered accordingly. Held: That section 13 of the mining act did not apply to the case, because the threatened danger was not such as to call for the use of props. Jewell Ridge Coal Corp. *v.* Keen, 514.

Negligence of Master.—In the instant case the foreman of defendant went with plaintiff's intestate, an experienced boiler-maker, to a car, described in the evidence as a Texas oil tank car, and pointed out to him the tank and instructed him to rivet a grab-iron on the end of the tank. Intestate well knew that the work to be done by him could only be done by going, or sending his helper, into the tank. Lying

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MASTER AND SERVANT—Continued.

Negligence of Master—Continued.

alongside of the tank was a line of hose charged with compressed air and connected with a compressed air machine, and readily available to blow out the tank if necessary. Intestate, however, did not blow out the tank. The company knew nothing of the contents of the tank. Held: That defendant company was not guilty of actionable negligence, where intestate was killed by an explosion of gas in the tank caused by the dropping of a heated rivet into the tank, as requested by him. It was not the duty of the company, under the circumstances, to send another employee to blow out the tank, which the intestate could do as well as any other. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

Non-Assignable Duties.—See *infra*, "Malicious Prosecution."

Rules of Master.—A railroad company had printed rules for the guidance of its employees, among them the following: "Engines will have steam blown off and blowers provided when possible to do so before a boiler-maker will be required to work in a fire-box. Tanks will be cleaned out before boiler-makers will be required to work inside of them." Held: That the rule had no application to oil tank cars. The context of the rule would seem to indicate that the rule was restricted to the engine tender tanks of locomotives, and that it was so restricted was stated to have been well understood by the employees of the company, which statement was not denied by any evidence in the instant case. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

Safe Place to Work.—The rule requiring the master to exercise proper care to provide a reasonably safe place for his employees does not require the master to exercise constant vigilance and supervision over the routine duties of his servants. If such place suddenly becomes unsafe by reason of some negligence of one servant and his fellow servant is thereby injured, the master is not responsible unless within a reasonable time after notice that such place has become unsafe, the master fails to remove the danger. Dreyfus & Co. *v.* Wooters, 42.

Appliances Prepared by Servant Himself.—In the instant case the scaffold upon which the plaintiff, a carpenter, was working was devised by him, was under his control, and was in itself a place of extreme danger, and the rule requiring the master to provide a reasonably safe place in which the servant is to work can have little appli-

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MASTER AND SERVANT—Continued.

Safe Place to Work—Continued.

Appliances Prepared by Servant Himself—Continued.

cation to such a situation, unless the master has himself constructed the place and directed the servant to use it. It differs from the permanent place required to be furnished in a mill or factory, or where the place, the machinery, or other appliances with which the servant is employed to work are furnished by the master. When the place at which the work is to be done, or the temporary appliances for doing the same, are prepared by the servant himself, a different rule applies, and the duty of the master is performed when he supplies his servant with the proper materials with which to construct such apliances. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

In the instant case, it was a part of the plaintiff's, a carpenter's duty, for his own protection, to keep the scaffold safe as well as to make it so. He must be held to the knowledge that, with other workmen there and suspended as it was, the danger of a fall might at any time become imminent. Every such service has its peculiar hazards, and this particular service, that is, the moving of this swinging scaffold, had in it elements of extreme peril to the plaintiff, which at all times demanded extreme caution, prudence and foresight on his own part to avoid just such an accident as occurred. E. I. DuPont, Etc., Co. *v.* Hipp, 49.

Servant Making Repairs.—The rule that it is the duty of the master to use ordinary care to provide a reasonably safe place in which the servant is to work does not generally apply where the servant is sent to make repairs in order to render the place safe. Houston's Adm'x *v.* Seaboard A. L. Ry., 290.

Scaffold.—See *infra*, "Assumption of Risk."

MERCHANTABLE TIMBER. See TREES AND TIMBER.

MERGER.

Options.—See *infra*, "Vendor and Purchaser."

Vendor and Purchaser.—The appellees gave the appellants an option to purchase a certain tract of land, within sixty days, at a certain price. This option was closed by a letter addressed to a bank, signed by all the parties, which in some respects, varied the terms of the option contract, and constituted the final agreement of the parties for the sale and

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MERGER—Continued.

Vender and Purchaser—Continued.

purchase of the land. Held: That the option contract was merged in the contract evidenced by the joint letter of the parties to the bank. Wolford *v.* Jackson, 280.

MILLS AND MILLDAMS.

Easements.—See *infra*, "Use of Water for Mill Purposes."

Prescription.—See *infra*, "Use of Water for Mill Purposes."

Use of Water for Mill Purposes.—Upon the partition and sale for partition of land on which a mill was situated, whereby the ownership of the mill was severed from the land through which the tail-race and waste-race of the mill flowed, the use of such races alternately in connection with the operation of the mill, by the temporary stopping of the discharge of water along the tail-race while the owners might be making necesary repairs to the mill, and the discharge of such water during such time by an overflow from a point above the mill into the waste-race, were easements (technically known as secondary easements), of an open, visible and permanent character, appurtenant to the ownership of said mill property as the dominant estate; were reasonably necessary to the enjoyment of the ownership of the mill property, and passed, by implication of law, to the grantee of the mill and his successors, as against the grantees of the land through which the races passed, without the use of any descriptive words of grant or reservation in the conveyances; such easements, upon the partition, being, by implication of law, charged upon the lands lying below the mill and on which such easements were then located, and those lands being thereby made servient to that extent to the mill property as the dominant estate. Kirk *v.* Hoge, 519.

The accustomed use fixed the right of use of the easements, and such easements were none the less valid because they consisted in the right of the use thereof at intervals of time, and for certain purposes, as for a diversion of water for certain repairing to be done. Kirk *v.* Hoge, 519.

The easements in the instant case having been created, upon the severance of the dominant and servient estates, and such severance having been made in a manner equivalent to a partition of the land, the conveyances making such partition, under which the appellants and appellees affected derive title, must be treated as if they were simultaneous conveyances, and the established principles governing the

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MILLS AND MILL DAMS—Continued.

Use of Water for Mill Purposes—Continued.

acquisition of easements by *implied grant* govern the case. Therefore, no question arises as to whether a *reservation* of an easement will be implied by law in the absence of any express reservation thereof. Kirk *v.* Hoge, 519.

Owners of a mill at intervals for a period much longer than twenty years were accustomed, when repairing the mill made it necesary, to divert the water flowing along the tail-race to a waste-race. This operation of the mill and races having been under a claim of right and hostile to the rights of the landowners through whose land the races passed, the mill owners, by adverse, uninterrupted (with respect to the accustomed use), notorious and exclusive enjoyment, as against such landowners, acquired prescriptive title to such easements. And this is true also as to the riparian lower owners of land on the natural channel of the creek, from which the water was originally diverted for the use of the mill. Kirk *v.* Hoge, 519.

Appellees, landowners, whose lands were located on the tail-race of a mill, claimed that they and those under whom they claim and derive title, had, by their long use and enjoyment of the water flowing in such tail-race, acquired title by prescription to the enjoyment of an uninterrupted flow of such water in such race. But there was never any use of the water by the appellees, or those under whom they claim, adverse or hostile to the right of appellants, the mill owners, to divert at intervals for repairs the water from the tail-race to a waste-race. The absence of such adverse or hostile element in the use relied on by such appellees—an element essential to the acquisition of right by prescription—is fatal to the claim of such appellees to a prescriptive right to the uninterrupted use of the water in the tail-race as against appellant. Kirk *v.* Hoge, 519.

MINES AND MINERALS.

Contributory Negligence.—In the instant case, plaintiff, a miner, was not guilty of contributory negligence in resuming work upon the promise of the mine foreman that he would have the place made safe, and the assurance of the slate men that the defects had been remedied. Jewell Ridge Coal Corp. *v.* Keen, 514.

Fellow Servants.—After plaintiff, a miner, had notified his foreman that his place of work was unsafe, the foreman directed the slate men to take down the loose slate or rock at plain-

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MINES AND MINERALS—Continued.

Fellow Servants—Continued.

tiff's place of work. Section 29, chapter 178, Acts of 1912, declares, that in discharging the duties required by the act, "the mine foreman, boss or fire boss, and their assistants shall be considered as acting for the mine owner or operator as a vice-principal." Held: That the slate men were not fellow servants of the plaintiff. Jewell Ridge Coal Corp. *v.* Keen, 514.

Master and Servant.—*Propping.—Acts 1912, section 13, page 427.*—Acts of 1912, section 13, page 427, provide that it shall be the duty of each miner to properly prop and secure his place so as to make it secure for him to work therein. In the case at bar, as soon as plaintiff was apprised of the fact that a dangerous condition had arisen at his place of work, in obedience to a positive rule of the defendant, he immediately ceased work, vacated the working place and reported the facts to the mine foreman. That official, upon inspection, determined that the situation did not call for use of props, but that the loose slate and rock should be taken down, and ordered accordingly. Held: That section 13 of the mining act did not apply to the case, because the threatened danger was not such as to call for the use of props. Jewell Ridge Coal Corp. *v.* Keen, 514.

MOOT CASES. See APPEAL AND ERROR.

MULTIFARIOUSNESS.

Attachment in Equity.—See *infra*, "County as Garnishee."

County as Garnishee.—The instant suits were attachments in equity, brought by complainants, who had furnished materials and supplies used in the construction of a road, to a subcontractor, against the contractor. There was a provision in the contract between the contractors and the county, that the county should retain a sufficient amount of the contract price to pay any claims against the contractor by subcontractor and materialmen. The bill was demurred to on the ground of multifariousness because the county was made a defendant. Held: That the county was made a defendant simply as a garnishee, and under the allegations of the bill was a proper party, and that the demurrer was, therefore, properly overruled. Catron *v.* Norton Hardware Co., 380.

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MUNICIPAL CORPORATIONS.

Appeal and Error.—See *infra*, "Change of Form of Government,"

Bridges.—See BRIDGES.

Change of Form of Government.—*Duties of Judge are Ministerial.*—In the case at bar, the statute imposed upon the circuit court, or the judge thereof, two duties, which so far as their nature is concerned could just as well have been imposed on any ministerial, or executive officer. The first of these was the ordering of the election, and the second the certifying of the results thereof to the city council. City of Roanoke *v.* Elliott, 393.

Election—Writ of Error.—After an election was duly ordered and held under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, the city petitioned asking to be made a party defendant to the proceeding whereby the election was ordered and held, and that the petitioners upon whose petition the election was ordered and held should be made defendants to the city's petition. Subsequently, a number of electors tendered their petition also asking to be made parties defendants. This procedure adopted by the city and the petitioning electors was anomalous. It was neither an ordinary common law action nor a suit in equity. It was not authorized by any statute, nor does it conform to the extraordinary common law remedies of *mandamus, quo warranto, or certiorari.* It is an attempted intervention in a proceding made *ex parte* by the statute. The action of the city in intervening in the cause was in the nature of an appearance of an *amicus curiae,* and was advisory only. It conferred no rights upon the city. City of Roanoke *v.* Elliott, 393.

In a proceeding under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, for an election to change the form of government of a city to that known as the "City Manager Plan," the judge of the circuit court acts in a ministerial capacity, and to his finding of facts certified to the clerk of the city council no writ of error lies. City of Roanoke *v.* Elliott, 393.

Under Acts 1914, page 165, as amended by Acts 1916, page 672, and Acts 1918, page 402, the judge was to ascertain and certify a fact, to-wit: Did "a majority of the electors, qualified to vote at such an election," vote for or against the proposed change? This, in the instant case, the judge did, and whether his construction of the statute was right or wrong, his duty was ministerial or judicial, no

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MUNICIPAL CORPORATIONS—Continued.

Bridges—Continued.

Change of Form of Government—Continued.

writ of error to, or appeal from, his order is given by these acts or any other statute of this State. City of Roanoke *v.* Elliott, 393.

Fire Limits.—Increase in fire risk and cost of insurance, caused by the erection, in violation of a town ordinance, of a wooden instead of a brick wall adjoining appellants' building, does not result in such special and irreparable damage to appellants' property as to entitle them to injunctive relief. Landon *v.* Kwass, 544.

Appellants erected a wooden instead of a brick wall on their premises adjoining the property of appellants. There could be no doubt that the appellees would have had the right to do what they did but for the provisions of a town ordinance. The ordinance itself was fully warranted by the charter of the town, and reserved to the council the discretion to determine whether a building erected in violation thereof should be torn down. Since the appellants are dependent entirely for their standing in court upon the ordinance, it would seem clear that they could not call upon a court of equity to exercise a discretion which that ordidance expressly reserved to the town council; therefore, a court of equity has no jurisdiction to grant a mandatory injunction against such wall. Landon *v.* Kwass, 544.

Liability of Municipality.—See STREETS AND HIGHWAYS.

Pollution of Watercourse.—See WATERS AND WATERCOURSES.

Road Tax.—See *infra*, "*Taxation.*"

Streets and Highways.—See STREETS AND HIGHWAYS.

Taxation.—An owner of property, whose place of business and all its property is located within the limits of a municipal corporation, which maintains its own streets, and which by charter provisions was constituted a separate road district, and persons and property therein relieved from payment of taxes and levies for county road purposes, provided it kept its own streets in order, is exempted from a county road tax on his property within the municipality. Planters Bk. *v.* Pr. Edward Co., 217.

MURDER. See HOMICIDE.

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NAMES.

Married Women.—In a proceeding by motion for judgment to recover damages for the negligent killing of plaintiff's intestate against a husband and wife, the wife should be impleaded by her own *baptismal*, or *Christian, name*, and not by the initial letters of her husband's name; the former is her legal designation. Ratcliffe *v.* McDonald's Adm'r, 781.

NAVIGABLE WATERS.

Pollution.—See WATERS AND WATERCOURSES.

NEGLIGENCE.

Automobiles.—See AUTOMOBILES.

Contributory Negligence.—See BRIDGES; MASTER AND SERVANT.

Carriers of Passengers.—See CARRIERS OF PASSENGERS.

Death by Wrongful Act.—See DEATH BY WRONGFUL ACT.

Inattention or Forgetfulness.—The general rule is, that inattention to or forgetfulness of a well-known danger or peril will not excuse a failure to avoid it. City of Charlottesville, *v.* Jones, 682.

But where no question of the assumption of risk is involved, but only a question of contributory negligence (as in the instant case), on principle, inattention or failure of memory would not be contributory negligence, if under all the circumstances of the case it was legally excusable. And it is so excusable under certain circumstances, as is expressly held by the authorities—as where the plaintiff has his attention diverted by such a cause, or causes, as would ordinarily induce such forgetfulness or inattention in an ordinarily prudent or careful person in the same or in a similar situation. And there are other circumstances which may take a case of lapse of memory or lack of attention from under the operation of the general rule mentioned. City of Charlotesville *v.* Jones, 682.

The inquiry concerning whether a failure of memory, or inattention, is such contributory negligence on the part of a plaintiff as will bar his recovery, is not different, in legal principle, or in practicable application, from the inquiry as to whether any other act of the plaintiff constitutes such negligence, and it is to be measured by the same standard applicable to all other acts thus drawn in question, namely, by the standard of the action of the ideal man, which has been fixed upon by the law, to-wit, the action of the

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NEGLIGENCE—Continued.

Contributory Negligence—Continued.

Inattention or Forgetfulnes—Continued.

ordinarily prudent or careful person under the same or similar circumstances. City of Charlottesville *v.* Jones, 682.

An instruction in an action for injuries caused by a fall from a bridge, due to the absence of a handrail, which, in effect, told the jury that there could be no legal excuse for a failure of memory, or for inattention, to a once known fact, would be error. In the instant case it was a question of fact for the jury to determine whether the plaintiff was negligent in his inattention to or forgetfulness of the absence of the handrail, if they believed from the evidence that he had prior knowledge of its absence. City of Charlottesville *v.* Jones, 682.

Last Clear Chance.—See CARRIERS OF PASSENGERS.

Forgetfulness.—See *infra*, "Contributory Negligence."

Inattention or Forgetfulness.—See *infra*, "Contributory Negligence."

Master and Servant.—See MASTER AND SERVANT.

Proximate and Remote Cause.—See BRIDGES.

NEW TRIALS.

Affidavits of Jurors.—See *infra*, "Misconduct of Jury."

Conflicting Evidence.—See APPEAL AND ERROR and see *infra*, "Verdict Contrary to Law and the Evidence."

Even in an issue out of chancery, the finding of a jury will not be disturbed unless it is palpably and obviously erroneous, or is without evidence to support it. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Misconduct of Jury.—Affidavits of jurors as to misconduct of them are received with great caution, and only in exceptional cases and in order to prevent a failure of justice. In the instant case, which was one of a quotient verdict, there was nothing in the record to take the case out of the established rule. Manor and Others *v.* Hindman, 767.

Natural Laws.—Plaintiff's Testimony Conflicting with Natural Laws. Va. R. & P. Co. *v.* Bailey, 250.

Verdict Contrary to Law and the Evidence.—In a statutory proceeding to ascertain the true boundary of lands where the

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NEW TRIALS—Continued.

Verdict Contrary to Law and the Evidence—Continued.

evidence on the subject of the location of the boundary was conflicting, the court was without power to set aside the verdict as contrary to the evidence. Wilkins *v.* Henderson, 275.

Even in an issue out of chancery, the finding of a jury will not be disturbed unless it is palpable and obviously erroneous, or is without evidence to support it. Stuart, Gov. *v.* Smith-Courtney Co., 231.

In a prosecution for violation of the prohibition act, the jury found the defendant guilty of transporting and selling whiskey contrary to law. The penalty imposed by the verdict did not exceed the minimum penalty for transporting. There was no evidence to support that portion of the verdict which found the accused guilty of selling whiskey contrary to law. Held: That although the court below erred in declining to set aside that portion of the verdict which found accused guilty of selling, yet the error was harmless, since the jury imposed no penalty for that offense. Collins *v.* Commonwealth, 815.

NOTICE.

Demurrer.— See DEMURRER.

Elections.— See ELECTIONS.

Vendor and Purchaser.—See VENDOR AND PURCHASER.

NUISANCES.

Drains and Sewers.— See *infra*, "Limitation of Actions."

Estoppel.—See *infra*, "Limitation of Actions."

Laches.— See *infra*, "Limitation of Actions."

Limitation of Actions.—In a suit for an injunction against a nuisance and for damages, where the nuisance was caused by defendant's sewer emptying into a creek which passed through plaintiff's land, defendant set up as grounds of defense the statute of limitations, laches and estoppel. It appeared that a 24-inch sewer was built after August 15, 1911, when plaintiff bought the property, and plaintiff's bill was filed November 15, 1914, within less than five years from that date. Before the installation of the 24-inch sewer, there had been a 12-inch sewer but very little sewage flowed through it—not enough to cause the injury complained of. So that, in point of fact, the nuisance, which it was the purpose of this suit to abate,

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NUISANCES—Continued.

Limitations of Actions—Continued.

was created within less than five years before its institution. Held: That the chancery court correctly overruled the defense of laches, estoppel and the statute of limitations. City of Richmond *v.* Richmond S. & G. Co., 1.

OPTIONS.

Merger.— See MERGER.

ORDER OF PROOF.

Action for Destroying a Building to Prevent the Spread of Fire.— In an action for destroying a building to prevent the spread of fire, the order of proof not being material, the court, in the exercise of its discretion, might permit evidence to be introduced of acts and conduct of persons wearing the uniform of the defendant, on condition that it should later be made to appear that such persons were acting as agents and employees of the defendant, and within the scope of their employment. Fardie *v.* E. I. DuPont, Etc., Co. 88.

ORDERS.

Consideration.—*Security for Existing Debt.*—An order upon a fund deposited with a clerk of court to abide the future decree of the court, given as security, in part, for an existing debt, is founded upon a valuable consideration, and it is immaterial that the beneficiary did not know of the order when it was given. The subsequent acceptance of it related back to the time it was given. Rinehart & Dennis Co. *v.* McArthur, 556.

Revocation.—M., by his counsel, deposited a fund with a clerk of court to abide the event of a suit pending. Thereafter, M. gave an order in writing to his counsel to pay over the fund when "of not further service in" the suit pending to the R. & D. Co. Counsel for M. was also counsel for the R. & D. Co. The order was supported by a valuable consideration and M. intended by it to transfer the fund to R. & D. Co. Held: That this constituted a valid equitable assignment of funds, which was irrevocable by M. Rinehart & Dennis Co. *v.* McArthur, 556.

ORDINANCES.

Fire Limits.—See INJUNCTIONS.

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ORDINANCES—Continued

Injunctions.—See INJUNCTIONS.

OYSTERS.

Grants.—Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication. Darling *v.* City of Newport News, 14.

Leases.—*Construction of Statute.*—A lease under the Virginia oyster law is made only "for the purpose of planting and propagating oysters thereon," and it is for this purpose alone that the planter is authorized to use and occupy such ground—that is to say, that while any citizen might have taken oysters therefrom before the grant, afterwards he only may do so and all others are excluded from either planting or taking oysters from such ground during his term; this marks the limit of his right, for there is nothing to indicate that any other public or private right is withdrawn, limited or curtailed. He does not take a fee simple title, nor can he use the property for any other purpose except for that stated in the statute, and hence every other right heretofore in the public is preserved. Nor is there any language in the statute indicating any intent to destroy or impair any of the ancient rights of the riparian owners. Darling *v.* City of Newport News, 14.

Under the Virginia statute (Acts 1910, chapter 343), as construed by the Supreme Court of Appeals the oyster planter takes his right to plant and propogate oysters on the public domain of the Commonwealth in the tidal waters, subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature; while another statute (Acts 1916, page 51) provides for the examination of such oyster-planting grounds so as to discover polluted areas, and prohibits the taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified and made suitable for human food. Darling *v.* City of Newport News, 14.

Pollution of Watercourse.—See WATERS AND WATERCOURSES.

Statutes.—See *infra*, "Leases."

PARENT AND CHILD.

Death by Wrongful Act.—See DEATH BY WRONGFUL ACT.
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PARTICULARS, BILL OF. See BILL OF PARTICULARS.

PARTIES.

Appeal and Error.—See APPEAL AND ERROR.

Objection for First Time on Appeal.—Where there is such a defect of parties to a suit that injustice may be done if the absent parties be not before the court, the Supreme Court of Appeals will remand the case in order that proper parties may be brought before the court, although no objection on that ground was made either in the trial court or on appeal. Jeffries *v.* Jeffries' Ex'or, 147.

Creditors' Suits.—See CREDITORS' SUITS.

Fraudulent and Voluntary Conveyances.—In a suit to set aside a deed as fraundulent, the remaindermen under the deed are necessary parties. Jeffries *v.* Jeffries' Ex'or, 147.

Necessity of Averments in Bill.—See *infra*, "Service of Process."

Service of Process.—*Necessity of Averments in Bill.*—A person cannot be made a party by simply naming him as a defendant and serving him with process. The bill must contain averments showing some cause for relief against him, else he is no party to the litigation. Jeffries *v.* Jeffries' Ex'or, 147.

A suit to set aside a deed from husband to wife as fraudulent was revived on the death of the husband. Under the deed alleged to be fraudulent the wife had only a life estate with remainder to the grantor's children. The children were not made parties to the suit and the deed was not filed as an exhibit with the bill, but was subsequently introduced in evidence. When the case was revived upon the death of the grantor in the deed, the recital in the decree of revival plainly showed that it was revived against his children as heirs of the grantor, and not as remaindermen in the deed from the grantor to his wife. Indeed, it could not have been otherwise, as there was not an allegation in the bill in any way affecting the children. There was nothing in the pleading to show that they had any manner of interest in the litigation, and if they had been made parties during the lifetime of their father, the case would have been dismissed as to them for lack of interest in the litigation upon the face of the pleadings. They could not, with propriety, have been made parties defendant to the suit, otherwise than as heirs of the grantor, without so amending the bill as to set out their in-

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PARTIES—Continued.

Service of Process—Continued.

terest under the debt. Held: That the children never having been made parties as remaindermen under the deed, they could not be bound to a decree in the suit. Jeffries *v.* Jeffries' Ex'or, 147.

Specific Performance.—See SPECIFIC PERFORMANCE.

Waiver.—Where no objection is made to defect of parties or irregularities in the procedure, and such defects and irregularities do not affect the jurisdiction of the court or the ability of the court to do justice between the parties to the controversy, they will not be noticed by the court, and will be deemed to have been waived. Catron *v.* Bostic, 355.

PARTNERSHIP.

Sale of Individual Real Estate.—The individual real estate of a partner cannot be subjected to partnership debts before the debts have been reduced to judgment, and it is error to decre a sale of such real estate to pay unsecured debts. Catron *v.* Bostic, 355.

Share of Profits.—See *infra*, "What Constitutes."

What Constitutes.—Where an employer had two clerks who were paid salaries and in addition to this were allowed a share of the net profits, in case the concern should earn such profits, but were in no event liable for any losses, there was no partnership between the employer and the clerks. The contingent interest of the clerks in the net profits was merely a means of measuring their salaries. Manor and Others *v.* Hindman, 767.

PAYMENT.

Vendor and Purchaser.—See VENDER AND PURCHASER.

PENALTIES AND FORFEITURES. See STATUTES.

Construction of Statute.— See *infra*, "Self-Executory."

Corporate Charter.—See CORPORATIONS.

Self-Executory.—A forfeiture created by Constitution or statute law may be self-executory, contrary to the rule that in all forfeitures accruing at common law nothing vests in the

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PENALTIES AND FORFEITURES—Continued.

Self-Executory—Continued.

government until some legal step shall be taken for the assertion of its right. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Where a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

A constitutional or statutory provision for a forfeiture to become effective before "some legal step" has been taken by the Commonwealth for the assertion of the forfeiture, as by inquest of office or some judicial proceeding or finding, is in derogation of the common law and, hence, will be strictly construed. Elliott's Knob I., Etc., Co., *v.* Corp. Com., 63.

Whether section 157 of the Constitution of 1902, providing for forfeiture of corporations under certain circumstances, is self-executory. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

PHYSICIANS AND SURGEONS.

Declaration.—See *infra*, "Malpractice."

Duty to Warn Patient.—It is not *per se* an act of negligence for a physician to fail to warn a patient of the danger of the possible bad consequences of using a remedy. Hunter *v.* Burroughs, 113.

Evidence.—See *infra*, "Malpractice."

Expert and Opinion Evidence.—See *infra*, "Malpractice."

Joinder of Causes of Action.—See *infra*, "Malpractice."

Malpractice.—See *infra*, "Duty to Warn Patient."

Declaration.—In an action for malpractice, whether this or that specific prescription, medicine or remedy should have been applied or not applied was a mere matter of evidence upon the issue of fact on the allegations of unskillfulness and negligence made by the declaration. To require the declaration to allege such details of evidence would be to depart from the rule established in Virginia on this subject. Hunter *v.* Burroughs, 113.

A count in a declaration in an action for malpractice charged in general terms that the defendant was un-

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PHYSICIANS AND SURGEONS—Continued.

Malpractice—Continued.

Declaration—Continued.

skilful and negligent, and among the allegations of fact constituting such unskilfulness and negligence was an allegation that the defendant did prescribe wholly improper and hurtful medicines, "being two certain salves, which were prescribed by and are known to him," which were wholly unsuited to defendant's condition. Held: That the count was good upon demurrer, and would have been good if the part quoted had been omitted, as it was an allegation of a matter of evidence and might be considered as surplusage. Further, as an allegation of fact it was sufficient to inform the defendant of the nature and character of the two salves, since it is alleged that they "were prescribed by and were known to him." This prevented his being taken by surprise by proof of his having prescribed such two salves. Hunter *v.* Burroughs, 113.

A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected to this count that it was fatally defective in that it did not allege that other specialists would not have been guilty of such omission. Held: That such allegation was in substance and effect contained in the allegations of the count as it stood, and the failure of the count to contain such express allegation did not deprive the defendant of his right to require the same character of proof on the subject as he was entitled to require if such express allegation had been contained in the count. Hunter *v.* Burroughs, 113.

A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. Held: That this count was not demurrable, because it did not allege in detail what test and examination should have been made of the plaintiff before the application of the X-ray, as the details as to whether this or that particular test and examination should have been made, were mere matters of evidence. Hunter *v.* Burroughs, 113.

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PHYSICIANS AND SURGEONS—Continued.

Malpractice—Continued.

Declaration—Continued.

A count in a declaration in an action for malpractice alleged that defendant was negligent in treating plaintiff with X-rays, without first making a preliminary examination to determine plaintiff's susceptibility to the influence of X-rays, as in the exercise of ordinary care it was his duty to make. It was objected that this count was demurrable because it failed to allege, except inferentially, that the plaintiff was in fact more susceptible to the influence of X-rays than other persons, and if such examination had been made it would have resulted in the discovery of such susceptibility. Held: That the point was well taken; that such allegation should have been made and distinctly made, with definiteness and certainty. An inferential allegation of such material fact was insufficient. But as the case did not turn upon the existence of any peculiar susceptibility of the plaintiff to X-rays, and the verdict was based upon other grounds, the error was harmless. Hunter *v.* Burroughs, 113.

Expert and Opinion Evidence.—In an action for malpractice, the standards of profesional skill and care by which the evidence as to the competency and the conduct of the defendant was to be measured, involved the highly specialized art of the treatment of eczema by X-rays, and in so far as they did so, expert testimony before the jury fixing such standards was essential to the support of the verdict of the jury; since otherwise the jury, to the extent of the questions involving such specialized art, would have had no standard in mind by which to measure the other facts proven in the case. Hunter *v.* Burroughs, 113.

Joinder of Causes of Action.—It was contended that the count referred to in the preceding syllabus was sounded in contract and not in tort and could not be united with other counts in tort. Held: That the count was unmistakably in tort. Hunter *v.* Burroughs, 113.

Promise of Cure.—A count in a declaration alleged that the plaintiff consulted defendant, a physician, regarding eczema and as to the proper treatment thereof; that the defendant knew, or should have known, of the danger of X-ray treatment in such case and misled the plaintiff by not only giving him no warning, but by affirmatively assuring him that X-Ray treatment would cure him. The

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PHYSICIANS AND SURGEONS—Continued.

Malpractice—Continued.

Promise of Cure—Continued.

count also alleged that had defendant given plaintiff warning of the danger of the X-ray treatment he would not have submitted to the treatment. Held: That the count stated a good cause of action against the defendant for giving, not a mere opinion, but the positive assurance of cure alleged. Hunter *v.* Burroughs, 113.

Result of Treatment as Evidence.—In an action for malpractice it was objected to certain instructions that thereby the jury were allowed to give some weight to the result of the treatment along with all the other facts and circumstances proven in the case, in determining whether the defendant posessed and used proper profesional skill, whereas defendant contended that no weight whatever, however slight, could properly be given to a bad result as evidence of unskilfulness, or of the negligence of defendant. Held: That defendant's position was untenable. While it is true that the result, however bad, is *of itself alone* insufficient evidence to establish the unskilfulness or the negligence of a physician in such a case as that at bar, yet it is not true that no weight whatever, "however slight," can be given to a bad result in such a case. Hunter *v.* Burroughs, 113.

Sufficiency of Declaration.—A count in a declaration in an action for malpractice charged that the defendant who treated the plaintiff with X-rays did not possess and apply sufficient knowledge and experience to anticipate and foresee the probable effect which the application of the X-ray treatment upon plaintiff's legs would produce, and to apply reasonably proper remedies, after using the X-ray treatment, to prevent plaintiff's flesh from being burned, but failed to anticipate the probable effect of the X-ray treatment and failed to apply reasonably proper and appropriate medicines, preventatives and remedies, after the treatment to prevent plaintiff's flesh and skin from being burned. Held: That the count contained allegations of fact which sharply and distinctly raised the issue whether the defendant was professionally unskilful and negligent, was sufficient. Hunter *v.* Burroughs, 113.

It was contended that the count referred to in the preceding headnote was defective because it did not state what were reasonably proper and appropriate medicines, preventatives and remedies which should have been used.

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PHYSICIANS AND SURGEONS—Continued.

Malpractice—Continued.

Sufficiency of Declaration—Continued.

Held: That the issues of fact raised by the count, in so far as they involved the highly specialized art of treatment of the disease of the plaintiff by X-rays, were to be decided, if they could be decided at all, only by the standard fixed by such evidence as might be furnished by experts on the subject. The plaintiff, a layman, could not have had knowledge of what specific "prescriptions, medicines and remedies" a physician of ordinary competency should not have failed to apply, whereas the defendant, if he possessed ordinary competency, upon the charges of professional unskilfulness in the treatment, should have known at once how to defend himself against such charges, by his own testimony and by the testimony of other experts on the subject. Hunter *v.* Burroughs, 113.

Sufficiency of Evidence.—In an action for malpractice plaintiff is not required to exclude by his proof the possibility of the result complained of having been due to causes for which the defendant was not responsible. If there is sufficient evidence, the credibility and weight of which is for the jury, tending to show that the bad result was more probably due to lack of skill or negligence of the defendant, it is enough. Hunter *v.* Burroughs, 113.

If the proof leaves it equally probable that the bad result complained of may have been due to a cause or causes for which the defendant was not responsible, as to a cause or causes for which he was responsible, the plaintiff cannot recover. Hunter *v.* Burroughs, 113.

PLATS. See BOUNDARIES.

PLEADING.

Answer.— See ANSWERS.

Bill of Particulars.—See "Bill of Particulars."

Declaration.— See MALICIOUS PROSECUTION.

Bill of Particulars.—See BILL OF PARTICULARS.

Malpractice.—See PHYSICIANS AND SURGEONS.

Master and Servant.—See MASTER AND SERVANT.

Sufficiency.—Where the allegations of a declaration are sufficient to inform the defendant of the nature and character of the demand against him and state such facts as

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PLEADING—Continued.

Declaration—Continued.

Sufficiency—Continued.

would enable the court to say, if the facts are proved as alleged, whether they establish a good cause of action, the declaration is good upon demurrer. Allegations in a declaration, which go beyond these requirements by descending into statements of details of proof, are unneccessary. Hunter *v.* Burroughs, 113.

Tort or Contract.—There is no question of a plaintiff's right to waive a contract and sue in tort for damages for breach of contract. Hunter *v.* Burroughs, 113.

Husband and Wife.—*Christian Name of Married Woman.*—In a proceeding by motion for judgment to recover damages for the negligent killing of plaintiff's intestate against a husband and wife, the wife should be impleaded by her own *baptismal,* or *Christian, name,* and not by the initial letters of her husband's name; the former is her legal designation. Ratcliffe *v.* McDonald's Adm'r, 781.

Names.—See *infra,* "Husband and Wife."

Variance.—See VARIANCE.

PRESCRIPTION.

Mills and Milldams.—See MILLS AND MILLDAMS.

PRESUMPTIONS AND BURDEN OF PROOF.

Account Stated.—Burden of proving that objection to account stated was made within a reasonable time. Buchanan, Adm'r *v.* Higginbotham, 662.

Advancements.—See "ADVANCEMENTS."

Bills, Notes and Checks.—See BILLS, NOTES AND CHECKS.

Constitutionality of Statute.—See STATUTES.

Corporations.—See CORPORATIONS.

Fire Insurance.—See FIRE INSURANCE.

Gifts.—See GIFTS.

Innocense.—One charged with crime is presumed to be innocent, and that presumption follows him throughout every stage of the trial. Canter *v.* Commonwealth, 794.

Intoxicating Liquors.—See INTOXICATING LIQUORS.

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PRESUMPTION AND BURDEN OF PROOF—Continued.

Judgments and Decrees.—There is every presumption that a statement in a decree is correct. Catron *v.* Bostic, 355.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

Probable Cause and Malicious Prosecution.—Va. R. &. P. Co. *v.* Klaff, 260.

Reasonable Doubt.—The burden of showing the guilt of the prisoner to the exclusion of every reasonable doubt is upon the Commonwealth, and this burden never shifts and always rests upon the prosecution. While the Commonwealth may prove such facts as may raise the presumption of guilt unless they are rebutted by the accused, still after the evidence is closed, if upon a consideration of the whole there is a reasonable doubt of his guilt, the jury should acquit. Canter *v.* Commonwealth, 794.

PRISONS AND PRISONERS.

Conflict of Jurisdiction between State and United States Courts.—If a person is in the actual custody of the United States for a violation of its laws, no State can by *habeas corpus*, or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State, is, by express enactment, beyond the reach of the federal courts or judges. Judiciary act, section 14; act March 2, 1833, section 7; 4 Stat. at Large, 634. Bowling *v.* Commonwealth, 340.

PROBABLE CAUSE. See MALICIOUS PROSECUTION.

PROBATE. See WILLS.

PUBLICATION. See SERVICE OF PROCESS.

PUBLIC OFFICERS.

Contempt.—Where money is in the hands of an officer of the court, subject to the order of the court, it is clearly a contempt of the court to refuse to surrender and pay over the money as directed by the court, and obedience to the order may be enforced by contempt proceedings involving the imprisonment of the officer. Rinehart & Dennis Co. *v.* McArthur, 556.

Mandamus.— See MANDAMUS.

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PUBLIC OFFICERS—Continued.

Mandamus—Continued.

Ministerial and executive officers, in the course of their official conduct, are construing statutes every day, and yet if, in consequence of their misconstruction, they fail to discharge their duties they may be compelled to do so. City of Roanoke *v.* Elliott, 393.

The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. While it is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus*, the practice of trying title to office by *mandamus* in Virginia is sustained by a line of decisions covering over a century of the State's judicial history, and it is now the well settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases. City of Roanoke *v.* Elliott, 393.

Ministerial or Judicial Duties.—Whether a duty imposed is judicial or ministerial is to be determined by the nature of that duty, and not by the tribunal or person that is to discharge it. Judicial tribunals are often charged with the performance of purely ministerial functions, and it is equally true that executive or ministerial officers are sometimes charged with judicial or *quasi* judicial functions. The duty to ascertain a fact from evidence does not *per se* render the duty judicial. City of Roanoke, *v.* Elliott, 393.

Quo Warranto.—The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. While it is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus*, the practice of trying title to office by *mandamus* in Virginia is sustained by a line of decisions covering over a century of the State's judicial history, and it is now the well settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases. City of Roanoke *v.* Elliott, 393.

PUBLIC PLACE. Gregory *v.* Hubard, 510.

QUESTIONS OF LAW AND FACT.

Fire Insurance. See FIRE INSURANCE.

Malicious Prosecution.—See MALICIOUS PROSECUTION.

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QUESTIONS OF LAW AND FACT—Continued.

Probable Cause and Malicious Prosecution.—Va. R. & P. Co. *v.* Klaff, 260.

QUO WARRANTO.

Public Officers.—The usual common law method of contesting title to an office is by a writ of *quo warranto*, or a writ in the nature of a writ of *quo warranto*, and that procedure is still available in this State. While it is generally held that the title to an office cannot be tried indirectly by a writ of *mandamus*, the practice of trying title to office by *mandamus* in Virginia is sustained by a line of decisions covering over a century of the State's judicial history, and it is now the well settled practice of the State, and affords a simple, expeditious, adequate and complete remedy in such cases. City of Roanoke *v.* Elliott, 393.

RAILROADS.

Master and Servant.— See MASTER AND SERVANT.

REAL PROPERTY. See LANDLORD AND TENANT; TREES AND TIMBER; VENDER AND PURCHASER.

Equity.—Jurisdiction of equity where title and boundary of land are concerned. Cumbee *v.* Ritter, 448.

Joint Adventures.— See JOINT ADVENTURES.

REASONABLE DOUBT.

In order to justify a conviction in a criminal case, every fact necessary to a conviction must be proved beyond a reasonable doubt. The result of the evidence must not only be consistent with the guilt of the acused, but must exclude every reasonable hypothesis of his innocence. Artrip *v.* Commonwealth, 790.

The burden of showing the guilt of the prisoner to the exclusion of every reasonable doubt is upon the Commonwealth, and this burden never shifts and always rests upon the prosecution. While the Commonwealth may prove such facts as may raise the presumption of guilt unless they are rebutted by the acused, still after the evidence is closed, if upon a consideration of the whole there is a reasonable doubt of his guilt, the jury should acquit. Cantor *v.* Commonwealth, 794.

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REASONABLE DOUBT—Continued.

Homicide.— See HOMICIDE.

RECOGNIZANCE. See BAIL AND RECOGNIZANCE.

RECORDS. See LOST INSTRUMENTS AND RECORDS.

Assignment of Errors.—See ASSIGNMENT OF ERRORS.

Best and Secondary Evidence.—Testimony of witnesses as to suits pending in a sister State, and as to what had been done therein, is inadmissible, as the records of the court are the best evidence as to such matters. Catron *v.* Bostic, 355.

Proceedings at Rules.—The proceedings at the rules are a part of the record of the court (Code of 1904, sections 3236 and 3237). Catron *v.* Bostic, 355.

Rules.—See *infra*, "Proceedings at Rules."

REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

Constitutional Law.— See *infra*, "Sale of Interest of Remaindermen.".

Infants.—See *infra*, "Sale of Interest of Remaindermen."

Judicial Sales.—See *infra*, "Sale of Interest of Remaindermen."

Sale of Interest of Remaindermen.—In the instant case testator devised a farm to his widow for life, with remainder to his nephews and nieces. The widow filed a bill under section 2436-b of the Code of 1904, praying that the farm might be sold and the proceeds invested for the benefit of the widow and the other persons interested. The reasons assigned for the sale were that the property was depreciating and that the widow was without means with which to keep up the property and was herself unable to manage the property. There was a general allegation that it was to the best interest of all parties directly or contingently interested that the land should be sold. Of the known remaindermen, sixty-eight were adults and five were infants; and of the thirty-six adult parties and two infants actually before the court, all the adults and the guardian *ad litem* of the infants demurred to the bill, and opposed a sale of the property. Without determining whether section 2436-b, Code of 1904, so far as it applies to infant remaindermen is constitutional, it was held that the case made by the bill would not justify the exercise of the jurisdic-

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REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS—Continued.

Sale of Interest of Remaindermen—Continued.

tion of the court under that statute to sell the remainder interest of the infants in the farm. Watkins *v.* Ford, 268.

A court of equity will not relieve the financial distress of a life tenant at the expense of an infant remainderman. Watkins *v.* Ford, 268.

Section 2436-b, Code of 1904, which authorizes the sale of an estate, real or personal, given by deed or will to a person for life, with a vested remainder to another, whether the vested remainderman be an infant or adult, to the extent to which it affects the rights of adult remaindermen, is unconstitutional. Watkins *v.* Ford, 268.

REMITTITUR.

Where a contractor filed its petition in the Circuit Court of the city of Richmond against the members of the Convict Lime Board, under a contract with the board, claiming a balance due for construction of a lime grinding plant, the reduction by the trial court of the verdict of the jury for the plaintiff, because certain charges, chiefly for repairs, which were made during the time the plaintiff was making efforts to correct deficiencies in the plant, had been included therein was proper. Stuart, Gov. *v.* Smith-Courtney Co., 231.

REPLEVIN BOND. See FORTHCOMING AND DELIVERY BOND.

REPORT OF CORPORATIONS. See CORPORATIONS.

RESCISSION, CANCELLATION AND REFORMATION.

Tax Deed.—See TAXATION.

RES JUDICATA. See FORMER ADJUDICATION OR RES ADJUICATA.

RIGHT OF ACTION. See ACTIONS.

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES.

RULES. See RECORDS.

SALES. See JUDICIAL SALES; VENDOR AND PURCHASER.

Action by Seller for Price.—*Defective Condition of Subject of Sale.*—Where the evidence left it equally probable that the

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SALES—Continued.

Action by Seller for Price—Continued.

defective condition of the subject of sale complained of by the buyer was as likely due to other causes for which the seller was not responsible, as to a cause for which he was responsible, there was no evidence to support a verdict of the jury in favor of the buyer. L. J. Upton & Co. *v.* Reeve, 241.

There was evidence in the very condition of the onion sets on arrival at Norfolk, in the matters of size and the quantity of dirt and trash in them, tending to show that they had not been "screened through (a) 7/8-inch mesh sieve" before shipment from Chicago, and, hence as to the non-screening of the onion sets through such a sieve, there was evidence sufficient to go to the jury to be weighed and considered by them along with all the other evidence in the case on the question of whether the onion sets had been screened before shipment as the contract required. An instruction, therefore, which withdrew the evidence of such condition of the onion sets from the consideration of the jury, was erroneous and prejudicial to the defendant. L. J. Upton & Co. *v.* Reeve, 241.

Advances by Vendees.—Where by a contract of sale the vendees bound themselves to lend a certain sum to the vendor as an advance upon the purchase money for the subject of the sale, the vendees are not prohibited from making further advances to the vendor, and having done so, prior to a deed of assignment by the vendor, the vendees have an equitable right to set off such further advances against the vendor in any settlement of accounts with him, and have the same rights against the trustee in the deed of assignment. Ellis, Etc., Co. *v.* Hubbard, 481.

Assignments for the Benefit of Creditors.— See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Breach of Contract by Seller.—*Evidence—Case at Bar.*—In the case at bar, taking the most favorable view of the evidence for defendant, such evidence left it equally probable that the condition of the onion sets upon their arrival in Norfolk might have been due to the negligence of the transportation company or the natural tendency to decay, due to the onion sets having been grown in a wet season, and not to their not having been in the condition the contract stipulated that they should be at the time of shipment. For the last named default only could the seller be held respon-

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SALES—Continued.

Breach of Contract by Seller—Continued.

sible. He did not warrant the keeping quality of the onion sets, or that they would germinate, nor was he responsible for any injury resulting from negligence of the carrier. L. J. Upton & Co. *v.* Reeve, 241.

Breech of Contract by Seller—*Condition of Subject at Place of Shipment and at Place of Destination.*—Plaintiff sold to defendant 600 bushels of onion sets "f. o. b. Chicago." The sets were to be shipped to defendant at Norfolk, the "sets to be in good merchantable condition at time of shipment, to be screened through 7/8-inch mesh sieve." In an action by the seller against the buyer for the purchase price of the onion sets, where defendant alleged that the plaintiff did not perform the contract on his part in that he did not deliver the onion sets in accordance with the contract of sale, the condition of the onion sets at Chicago at the time of their shipment was in issue in the case, and not their condition at Norfolk, save in so far as the latter was proper evidence of their prior condition at Chicago. L. J. Upton & Co. *v.* Reeve, 241.

Conditions.—*Conditions Precedent to Payment Distinguished From Conditions Precedent to Passage of Title.*—In the instant case all the provisions of the contract relied on for appellees as conditions precedent to the passing of the property or title thereto, appear from the contract itself as conditions precedent only to the payment in full of the purchase money, and not to the passing of the property or title thereto—a wholly different thing. The only conditions precedent to the passage of the property or title, as expressly provided in the contract, were those and those only which were to serve to segregate and identify the lumber—to appropriate it, as the subject of the contract. Ellis, Etc., Co. *v.* Hubbard, 481.

Conditions Subsequent.—A complete bargain and sale of chattels may be made subject to a condition subsequent that the chattels shall conform to any stipulated specifications. In such case, the title to the chattels passes at the time of the bargain and sale, notwithstanding the fact that the sale is subject to be defeated in whole or in part by the failure of the chattels to fulfil the stipulated specifications, when such fact is subsequently ascertained. The bargain and sale in such case is a conditional one, to be sure; but the condition is a subsequent and not a prece-

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SALES—Continued.

Conditions—Continued.

Conditions Subsequent—Continued.

dent condition to the passing of the title, and in no way prevents the latter taking place. Ellis, Etc., Co. *v.* Hubbard, 481.

Construction.—See *infra*, "Intention."

Construction by Parties.—The construction put upon contracts of sale by the parties themselves is accepted by the courts where it does no violence to the language used. Manor and Others *v.* Hindman, 767.

Damages.—*Loss of Profits by Purchaser.*—If at the time a contract of sale is made, the seller has notice or knowledge that the goods are being purchased for resale in a particular market, or to be supplied in pursuance of a particular contract, he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, and, if he breaks his contract, damages for losses caused thereby, if not uncertain or remote, may be recovered. Manor and Others *v.* Hindman, 767.

It is sometimes objected that a loss of profits is not a proper subject of compensation, and this is often true. It is not, however, because profits in themselves may not, if lost, be properly made the basis of a recovery, but because in most cases in which such a claim is made the profits in question are too speculative, uncertain or remote to be considered. Where, on the other hand, the loss of profits can be shown with reasonable certainty, a recovery may be had for the amounts so lost. Manor and Others *v.* Hindman, 767.

A buyer who, in the circumstances set out in syllabus 5, has made a sub-contract, is entitled to obtain and supply the article which his vendor has failed to furnish under his contract, and if he is compelled to pay a higher price for the substitute thus procured, he may recover as damages the difference between what he was to pay for the original article and what he is thus compelled to pay for the substitute. Manor and Others *v.* Hindman, 767.

Delivery.—See *infra*, "Time of Delivery."

Delivery on Installments.—See *infra*, "Time of Delivery."

Evidence.—See *infra*, "Breach of Contract by Seller;" "Hypothetical question."

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SALES—Continued.

Executory Contract.—See *infra*, "Subject of Sale Not in Existence."

Hypothetical Question.—Counsel for defendant asked a witness the following question: "If a car of yellow onion sets was properly packed in a refrigerated car in Chicago on the 13th day of January, 1916, and arrived here on the 24th day of January, 1916, in the same car in which they were packed, which car was a refrigerated car, and at the time of its arrival the car was cool and in proper condition, ought those onion sets to have been in the same condition as they were at the time they were shipped in Chicago?" Counsel for plaintiff objected to the question on the ground that it was a hypothetical question based upon a partial statement of the facts. The court sustained this objection. It appeared that an affirmative answer would have been given to the question. Held: That the question was fatally defective in that it failed to include a statement of the maintenance of a proper condition of refrigeration and ventilation of the car containing the shipment while it was in transit from Chicago to Norfolk. Therefore, there was no error in the action of the court below in declining to allow an answer to be given to the question. L. J. Upton & Co. *v.* Reeve, 241.

Intention.—See *infra*, "When Title Passes."

The agreement is just what the parties intend to make it, if that intention is clearly and unequivocally manifested, *cadit questio*. Ellis, Etc. Co. *v.* Hubbard, 481.

Interpretation.—See *infra*, "Construction."

Judicial Sales.—See JUDICIAL SALES.

Profits.—See *infra*, "Damages."

Subject of Sale Not in Existence.—Where lumber, the subject of a contract of sale, was not in existence at the time the contract was made, the subject of the contract, therefore, was not specific at that time, and the conditions specified in the contract being unperformed, the contract with respect to all of its conditions was entirely executory. To convert this executory contract into a complete bargain and sale of the lumber, so as to pass title to the vendees, two things only were essential: First, that the lumber should become specific—*i. e.*, that it should come into existence and be segregated and set apart as the subject of the contract; and second, the performance of the other conditions

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SALES—Continued.

Subject of Sale Not in Existence—Continued.

precedent, if any, to the passing of the property or title, as stipulated in the contract. Ellis, Etc., Co. *v.* Hubbard, 481.

Timber.—See TREES AND TIMBER.

Time of Delivery.—Plaintiff bought of defendants, who owned a flour mill at which they manufactured and sold large quantities of flour, 1,800 barrels of flour in October and November, 1914, for November and December delivery. It was understood by the parties that the purchaser intended to solicit buyers for the flour at a profit to himself in the territory near his place of business, and that the orders to ship directly to these buyers would be sent in to the sellers after such sales were made, together with proper specifications as to the size of the packages in which the flour was to be shipped. Under this contract, 902 barrels of flour were ordered and shipped, and on December 30th and 31st, the purchaser sent in to the sellers the specifications for 898 barels, the balance due on the contract. The sellers declined to ship, and claimed that under the contract they had the right to insist that the specifications should be received by them in sufficient time to enable them to manufacture and ship the flour on or before the 31st day of December. Held: That while it is doubtless true that if the sellers had claimed that their facilities were so limited that it was impossible to deliver 898 barrels of flour on the 30th and 31st of December, they should have been allowed a reasonable time in which to make such delivery, their claim that they had a right to time to manufacture the flour is untenable. They had sold the flour under the circumstances mentioned, and it was their duty to have it ready for delivery whenever it was called for during the months of November and December. Manor and Others *v.* Hindman, 767.

Title.—See *infra*, "When Title Passes."

When Title Passes.—*Conditions.*—See *infra*, "Conditions."

Lord Ellenborough's Rules.—Where the contract of sale is express, plain and unequivocal, Lord Ellenborough's famous rules to determine the intention of the parties as to when the property or title of the subject of the sale shall pass, are inapplicable, since they do not have to be resorted to in order to ascertain the intention of the parties to the contract. Ellis, Etc., Co. *v.* Hubbard, 481.

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SALES—Continued.

When Title Passes—Continued.

Specific Subject Matter.—That the subject thereof must be specific is essential to the validity of every contract of bargain and sale. It inheres in the very nature of the transaction that a bargain and sale cannot be made of chattels not yet identified—the ownership cannot change, the property or title cannot pass, until the particular property which is the subject of the contract becomes ascertained. This is true independently of the intention of the vendor and vendee. So long as the subject of the contract remains undetermined, the law will conclusively presume that the contract is executory, and no property or title can pass from vendor to vendee. This, however, is the sole element in such a contract which is independent of the intention of the parties. Ellis, Etc., Co. *v.* Hubbard, 481.

When the subject of a contract of sale is or has become specific, whether or not the property or title thereto passes becomes wholly a matter of the mutual intention of the parties, vendor and vendee—wholly a matter of contract between them. In such case, neither delivery of the chattel to the vendee, nor the completion of its manufacture, or anything else to be done to it so that it may be ready for such delivery, nor the measurement or testing of it (when it is to be measured or tested in any way), nor anything further to be done to ascertain the quality, or the quantity, or the price; nor the payment of the purchase money, or any part of it, is essential to the passing of the property or title to the vendee, if the contract provides it shall so pass at a stated time and when the chatel is in a condition stated in the contract. The conditions stipulated in the contract as to these matters are the sole conditions precedent to the passing of the property or title, all other conditions precedent being thereby waived; the vendor being bound by the contract to pass and the vendees to accept the property and title thereto when such conditions have been performed or exist—and hence the property or title then passes to the vendees under the terms of the contract. Ellis, Ets., Co. *v.* Hubbard, 481.

In the instant case, the lumber, which was the subject of the contract, after it came into existence by being sawed, was piled on sticks on certain land leased by the vendees, as provided for in the contract—which was away from the mill and other lumber of the vendor—there being no other lumber than that which was the subject of the contract on

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SALES—Continued.

When Title Passes—Continued.

Specific Subject Matter—Continued.

such land. The lumber was thus segregated and set apart by delivery on the leased land, and this was in legal phrase the appropriation of specific goods to the contract, the sole element deficient in a perfect sale was thus supplied. And this was done, not under subsequent mutual agreement of the parties—which would have been sufficient to convert the prior executory contract into a complete bargain and sale—but under the very terms of the contract in writing, which expressly provided that the title should then pass to the vendees. Ellis, Etc., Co. *v.* Hubbard, 481.

SERVICE OF PROCESS. See PARTIES.

Publication.—*Default.*—When a suit in equity is matured by order of publication against a non-resident, who does not appear, the bill is not taken for confessed, but the case is simply set for hearing on the process thus executed. It is the duty, therefore, of the complainant, to prove his case. If, as in the instant case, this proof is offered in the form of depositions, the defendant is entitled to notice of the time and place of taking them, else they cannot be read against him. This notice may be constructive, as well as the notice to commence the suit. But there must be notice of some kind and this notice must be given before the depositions are taken. Notice afterwards comes too late. Jeffries *v.* Jeffries' Ex'or, 147.

Of What Proceedings Notice.—It is entirely competent for the legislature to dispense with more than one publication, and to provide that one publication shall be notice of all proceedings in the cause subsequent to the completion of the order, and the legislature of this State has so provided by section 3232 of the Code of 1904. Under this section, "the case may be tried and heard" as to the non-resident, but the section does not authorize the taking of the bill for confessed at any time nor the doing of any act before the completion of the order. Depositions taken before that time without other notice than that furnished by the order are not taken pursuant to the statute, and cannot be given in evidence against a non-resident who has not appeared in the case, nor assented thereto. Jeffries *v.* Jeffries' Ex'or, 147.

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SHERIFF'S SALES. See JUDICIAL SALES.

SPECIFIC PERFORMANCE.

Conditional Contract.—A contract of exchange of lands cannot be enforced at the instance of either party, when it is conditional and dependent upon the will of third persons, namely, the lien creditors of both parties. Aetna Ins. Co. *v.* Aston, 327.

Construction of Contract.—A written contract for the sale of "all merchantable timber" upon a certain tract of land is in itself conclusive that there was a meeting of the minds of all the parties thereto in its use of the words "all merchantable timber" as descriptive of the timber sold and purchased. What may be the proper construction of that language is a wholly different matter. If it has a certain and definite meaning, which may be ascertained by established methods of construction of the provisions of contracts, that is sufficient, in so far as the validity of the contract in that particular is concerned. These questions of construction arise in a majority of cases that come before the courts for the interpretation and enforcement of contracts, but are never considered as grounds for cancelling the instrument. Adams *v.* Hazen, 304.

Contract.—See *infra*, "Conditional Contract," "Construction of Contract," "Formal Contract to Be Prepared," "What Contracts Will Be Enforced."

Proof and Terms.—The contract must be distinctly proven, and its terms clearly ascertained. It must be reasonable, certain, legal, mutual, based upon a valuable consideration, and the party seeking performance must not have been backward in enforcing his rights, but ready, desirious, prompt and eager. Adams *v.* Hazen, 304.

Contract Not Enforceable.—Upon principles of public policy, a party to a contract of exchange of lands could not enforce the contract of exchange, where the wife of the other party had never signed the contract, although she was part owner of the land and had her dower interest in the remainder of the land. Aetna Ins. Co. *v.* Aston, 327.

Deeds.—See *infra*, "Tender of Deed."

Discretion of Court.—Every application for the specific performance of a contract is addressed to the sound discretion of the court, regulated by established principles. Adams *v.* Hazen, 304.

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SPECIFIC PERFORMANCE—Continued.

Formal Contract to Be Prepared.—If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. And if, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. Adams *v.* Hazen, 304.

A contract for the sale of timber contained the following provision: "Terms of sale half cash when transfer papers are properly gotten up, and remainder to be settled by note payable six months from date." Held: That, construing this clause, along with the whole instrument, its language was not ambiguous and plainly referred only to such formal papers as were necessary to carry the contract into effect. The further papers to be executed by the parties were not to be of an *executory* character, in so far as the contract in question was concerned, but were to consummate and carry into effect, that contract—to execute the contract, to the extent of making a "transfer" or conveyance to the vendee in accordance with his rights under such contract. The contract was, therefore, not such an incomplete and tentative contract as a court of equity would decline to specifically execute. Adams *v.* Hazen, 304.

Intention.—See *infra*, "Construction of Contract."

Joint Wills.—While a court of probate cannot admit a joint or mutual will to probate as the will of one of the testators who has revoked the same on his part, it has long been well settled that a court of equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent fraud, may, in a proper cause, enforce the agreement, notwithstanding a revocation by one of the parties, by decreeing specific performance of the agreement, or by fastening a trust on the property in favor of the beneficiaries of the will revoked in violation of the agreement. Williams *v.* Williams, 643.

Meeting of Minds.—See *infra*, "Construction of Contract."

Parties.—See *infra*, "Transfer of Land by Vendors."

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SPECIFIC PERFORMANCE—Continued.

Tender of Deed.—Whether or not a vendor in a suit for specific performance must tender a deed with his bill must be regarded as an open question in this State, but in the case at bar, as the vendees declined to accept any deed that did not contain the courses and distances of the land, and the vendors had the right to decline to give it would have been futile to have required the tender of a deed which the purchasers had declared in the most explicit terms they would not accept. Wolford *v.* Jackson, 280.

Time for Removal of Timber.—It is well settled that where no time for the removal of timber is specified in timber contracts, the contracts will be construed as providing, by implication, for "a reasonable time" for such removal. A contract, therefore, for the sale of timber, which does not fix any time for the removal of the timber, is not incomplete, nor unenforceable, because of this omission. Adams *v.* Hazen, 304.

Transfer of Land by Vendors.—Where vendors, seeking to enforce specifically a contract of sale against the vendees, had transferred the property to a holding company with full notice of the rights of all the parties, and without consideration, the holding company occupying the position of a mere trustee, the vendors had a sufficient interest in the property to maintain suit for specific performance in their own names. Wolford *v.* Jackson, 280.

What Contracts Will Be Enforced.—See *infra*, "Formal Contract to Be Prepared."

Where the contract is in writing it must contain all the essential elements of a valid executory contract—that is to say, competent parties, a legal subject matter, a valuable consideration and mutual assent—before it will be enforced in equity. Adams *v.* Hazen, 304.

Wills.—See *infra*, "Joint Wills."

STARE DECISIS.

Wills.—See WILLS.

STATE.

Action Against.—Proceedings based upon contracts will lie against the State and its agencies under section 746 of the Code of 1904. Sections 747, 748 and 749, immediately following, provide for the procedure, while section 750 limits

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STATE—Continued.

Action Against—Continued

the effect of judgments or decrees which may be rendered against the Commonwealth in such proceedings. Stuart, Gov. *v.* Smith-Courtney Co., 231.

The statute (section 746, 750, Code of 1904) providing for relief against the State by proceedings based upon contract, will be liberally construed. Stuart, Gov. *v.* Smith-Courtney Co., 231.

The Commonwealth will not be astute to escape inquiry into its liability for its alleged contracts, or to take advantage of technical defenses which are permissible to other litigants. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Contracts.—*Judiciary Interfering With Executive Functions.*—In trying a case brought by a contractor, claiming a balance due for the construction of a lime grinding plant, under a contract with the Convict Lime Board, the Circuit Court of the city of Richmond was not substituting its discretion and that of the jury for the discretion of the Convict Lime Board, but was merely ascertaining in the method prescribed by statute whether or not, under the contract, there was any debt fairly due by the Commonwealth to the plaintiff. The board had the discretion to discard the machinery and to substitute other machinery therefor. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Pecuniary Obligation Founded on Contract.—While the exercise of governmental discretion can never be controlled or directed by the courts, if it is alleged that out of the exercise of such discretion there arises a pecuniary obligation of this Commonwealth, based upon a contract, the Circuit Court of the city of Richmond is open for the determination of that issue. Such proceedings, however, if they result in a judgment, simply establish the demand. No execution can be levied thereunder to subject either the property of the State, its governmental agencies, or that of persons constituting such governmental agency. A special appropriation is necessary before payment of such demand. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Franchise.—See FRANCHISE.

Judgment.—*Enforcement of Judgment Against State.* Stuart, Gov. *v.* Smith-Courtney Co., 231.

Refunding Bonds.—See CONSTITUTIONAL LAW.

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STATUTES.

Code.— See *infra*, "Revision."

Codification.— See *infra*, "General Act."

Constitutionality.— See *infra*, "Emergency Clause."

Constitutional Law.— *Necessity of Determination of Constitutionality of Act.*—If a case can be determined upon other grounds, the constitutionality of a statute will not be drawn in question or passed upon. Watkins *v.* Ford, 268.

Construction.— See OYSTERS; TAXATION.

And see *infra*, "Ejusdem Generis," "General Acts," "Penal Statute."

It is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to the words used their ordinary and popular meaning, unless it plainly appears that they were used in some other sense. If the intention of the legislature can be thus discovered, it is not permissible to add to or subtract from the words used in the statute. Posey *v.* Commonwealth, 551.

Section 746 of the Code of 1904, providing for action against State. Stuart, Gov. *v.* Smith-Courtney Co., 231.

When the words of Constitutions and of statutes are unambiguous and have a clear and definit meaning, indicating their purpose, it is well settled that courts are not permitted to interpret that which needs no interpretation, and that general rules for the construction of statutes of doubtful meaning have no application. If the intention is manifest from the language used and leads to no absurd conclusion, courts must give such provisions the effect clearly intended. Hollywood Cemetery Co. *v.* Com., 106.

Where the meaning of the words used in an act of Assembly is clear, the courts have no power but to declare it, and leave the question of policy to the legislature where it properly belongs. Posey *v.* Commonwealth, 551.

Penalties and Forfeitures. See PENALTIES AND FORFEITURES.

Prior Statutes.—The statute law, existing at the passage of an act, as well as the common law, should be borne in mind in construing it, and the latter statute should be con-

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STATUTES—Continued.

Construction—Continued.

Prior Statutes—Continued.

strued in the light of the prior statute law on the subject. Keister's Adm'r *v.* Keister's Ex'ors, 157.

Revision.—See *infra*, "Revision."

Construction—*Derogation of Common Law.*—See *infra*, "Derogation of Common Law."

Delegation of Power by Legislature.—See CONSTITUTIONAL LAW.

Derogation of Common Law.—Self-Executory forfeitures. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

The legislature is presumed to have known and to have had the common law in mind in the enactment of a statute; and the statute will be construed to read as if the common law remained unchanged (that is to say, the statute will be read along with the provisions of the common law, and the latter will be read into the statute), unless the purpose of the statute to change the common law appears from the express language of it or by necessary implication from such language. Keister's Adm'r *v.* Keister's Ex'ors, 157.

Ejusdem Generis.—The rule that where specific enumeration is followed by general words, the latter must be of the same kind as the former, usually called the doctrine of *ejusdem generis*, is only a rule of construction, and, applied to statutes, intended to throw light on a statute of otherwise doubtful import, and has no application where the language of the statute plainly manifests a contrary purpose. In such case, the obvious intention of the legislature must be given effect rather than defeated by the misapplication of a rule, the conceded function of which is to elucidate what is obscure, and not to obscure that which is manifest. Corby Baking Co. *v.* Commonwealth, 10.

The *ejusdem generis* rule of construction does not obtain where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety; in such case, the general term must receive its natural and wide meaning. Corby Baking Co. *v.* Commonwealth, 10.

Emergency Clause.—Section 53 of the Constitution of 1902 forbids putting statutes other than appropriation bills into immediate operation, "unless in case of emergency (which

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STATUTES—Continued.

Emergency Clause—Continued.

emergency shall be expressed in the body of the bill)." It is, therefore, necessary to state in the body of the bill that an emergency exists, in order that it may be put into immediate effect, for so the Constitution declares, but the grounds of the emergency need not be stated. City of Roanoke v. Elliott, 393.

The legislature is the sole judge of what shall constitute an emergency which will justify putting an act into immediate effect, and its action is not reviewable by the courts. Whether the reasons actuating the legislature to take such action were good or bad, reasonable or unreasonable, are not subjects of judicial inquiry. It is a matter resting wholly with the legislature. City of Roanoke, *v.* Elliott, 393.

General Act.—To a general act on a subject, in which the entire law on that subject is recast and condensed and certain provisions of the former law are repealed, the same rule of construction is applicable as is applicable to a general codification of statute laws. No intention to change the meaning or effect of prior statutes is to be inferred from a mere change of phraseology in the statute as codified. The presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. Keister's Adm'r *v.* Keister's Ex'ors, 157.

Grants in Derogation of Public Right.—Grants in derogation of the common or public right are always strictly construed against the grantee. Nothing passes except what is granted specifically or by necessary implication. Darling *v.* City of Newport News, 14.

Intent of Legislature.— See *infra*, "Construction."

Interpretation.— See *infra*, "Construction."

Penal Statute.—Statutes which are penal in their nature and entail forfeitures are to be strictly construed against the imposition of the penalty or the enforcement of the forfeiture. Dennis *v.* Robertson, 456.

Penalties and Forfeitures.— See PENALTIES AND FORFEITURES.

Presumption in Favor of Constitutionality.—Every presumption is to be made in favor of the constitutionality of a statute, and it will never be declared to be unconstitutional unless it is plainly and clearly so. If any reasonable doubt exists as

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STATUTES—Continued.

Presumption in Favor of Constitutionality—Continued.

to its constitutionality, the act will be upheld. To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it, and the case must be plain indeed before a court will declare a statute null and void. City of Roanoke *v.* Elliott, 393.

Repeal.— See *infra*, "General Act."

Revision.—The general rule of construction of statutes is firmly established by the decisions of the Supreme Court of Appeals, that where there has been a revision of the laws the presumption is that the old law was not intended to be changed unless a contrary intention plainly appears in the new. Chapman *v.* Richardson, 388.

Statutes Construed as a Whole.—See *infra*, "Construction."

Title.— *Waiver of Statute of Limitations.*—The title of the act of March 12, 1912 (Acts 1912, page 292, chapter 144), providing for the presentation to the board of sinking fund commissioners for funding of any bonds, coupons or other obligations on which it is claimed that the Commonwealth of Virginia is liable by reason of having guaranteed the payment of the principal sum or interest, is not defective, and insufficient because no reference therein was made to the waiver of the statute of limitations by the State contained in the body of the act. Stuart's Ex'ors *v.* Sinking Fund Com'rs, 224.

Waiver of Statute of Limitations.—See *infra*, "Title."

STATUTORY BONDS. See BONDS.

STREET RAILWAYS. See CARRIERS OF PASSENGERS.

Alighting:—See CARRIERS OF PASSENGERS.

Duty to Give Reasonable Time for Passenger to Alight.—See CARRIERS OF PASSENGERS.

STREETS AND HIGHWAYS.

Abutting Owners.—Where a boy was rightfully in a street and was injured by the fall of a large gate, the falling of the gate being caused by the negligent construction under the supervision of the landowners, the landowners are liable, and

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STREETS AND HIGHWAYS—Continued.

Abutting Owners—Continued.

the fact that the premises were in the exclusive possession of a tenant was immaterial, the owners themselves having created the danger. The case is different if the tenant himself, without the authority or knowledge of the owner, creates a dangerous condition. King *v.* Hartung, 185.

A property owner is bound at his peril to see that his premises are safe as to persons using the street upon which the premises abut. King *v.* Hartung, 185.

Things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident. King *v.* Hartung, 185.

Where a boy rightfully in a street is injured by a gate which opened out into the street falling upon him, the owner of the premises upon which the gate is situated is liable for injuries to the boy, although the gate was erected by an independent contractor and its fall was due to negligence in construction. King *v.* Hartung, 185.

In actions for injuries to passengers in streets, there is no reason for a distinction between the case of an awning projecting over a street and the case of any other part of a building, which, though not projecting over the street, is liable to fall upon it. King *v.* Hartung, 185.

Appeal and Error.—*Review of a Decision of Board of Supervisors by Circuit Court.*—The finding and order of a board of supervisors that a road and landing ought not to be established and the dismissal of the application for the establishment of the landing and road are reviewable by the circuit court, under section 944a, subsection 5, Pollard's Supplement, 1910. Chapman *v.* Richardson, 388.

From the early history of the Commonwealth to the present time, the different statutes on the subject have given an appeal of right to *any person* who thinks himself aggrieved by an order in a controversy concerning a county road. Chapman *v.* Richardson, 388.

Whenever the board of supervisors reach the point in the investigation where they are of opinion that the road or landing ought not to be established, then it becomes their duty to proceed no further, but to enter an order to that effect and to dismiss the application. Obviously, such order is a

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STREETS AND HIGHWAYS—Continued.

Appeal and Error—Continued.

finality in that tribunal so far as the applicant is concerned, and to say that he has no appeal from such order "at that stage of the proceedings" amounts to an absolute denial of his right of appeal. The order expressly denies the application and dismisses the proceeding, which ended the controversy, and there could be no subsequent "stage of the proceeding." Chapman *v.* Richardson, 388.

Awnings.—In actions for injuries to passengers in streets, there is no reason for a distinction between the case of an awning projecting over a street and the case of any other part of a building, which, though not projecting over the street, is liable to fall upon it. King *v.* Hartung, 185.

Bridges.—See BRIDGES.

Due Process of Law.—See *infra*, "Eminent Domain."

Eminent Domain.—The special road law of Giles county constituted the road commission a court with power of adjournment from time to time and from place to place, and conferred upon it the jurisdiction to disregard the route of the road proposed in the application therefor and to choose and establish a wholly different location therefor. Appellants having been duly summoned before the road commission at the time and place of their initial meeting were thereby duly made parties to all the subsequent proceedings of the road commission, including a change in the location of the road; were thus given their day in court; and were bound by such proceedings, under the provisions of such special road law, except as they might be relieved therefrom upon appeal taken in accordance therewith. Thus were the appellants afforded due process of law, including a trial by jury as provided for in such statute. Snidow *v.* Supervisors, 578.

Establishment of New Road.—*Special Road Law of Giles County.*—In the instant case, it was objected by appellants that the district board of road commissioners for Pembroke district undertook to make certain changes in the road in question, which could be done only in conjunction with the district board of *Pembroke* (Pearisburg) district, as provided for by the road act of Giles county, since both districts would be affected by such change. Held: That the provision relied on by appellants only applied where the application is for a new road or changing of an existing road, which is "in more than one district," and, therefore, had

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STREETS AND HIGHWAYS—Continued.

Establishment of New Road—Continued.

no application in the instant case, as the road in question was wholly in the Pembroke district. Snidow *v.* Board of Supervisors, 578.

Giles County.—See infra, "Special, Road Law of Giles County."

Independent Contractors.—See INDEPENDENT CONTRACTORS.

Injury to Person in Street.—See *Infra*, "Abutting Owners;" "Unopened Street."

Liability of Municipality.—See *infra*, "Segregation of Part of Street;" "Unopened Street."

Nuisances.—*Projections.*—Things projecting over a walk, or so situated with reference thereto that if they fall they may do injury to travelers, are nuisances unless so secured as to be absolutely safe, and the person maintaining them is liable for all injuries arising therefrom, except such as are attributable to inevitable accident. King *v.* Hartung, 185.

Segregation of Part of Street.—A street is usually an entirety—an unobstructed way. A city cannot by mental reservation of its officials segregate a small intermediate section of a continuous street and thus avoid its customary obligations as to such part so reserved. If it proposes to make such exception it must give the public notice thereof by some unequivocal act, such as the erection of an impassable barrier to travel, or by some other unmistakable evidence of such withdrawal from public use. City of Roanoke *v.* Sartini, 415.

Special Road Law of Giles County.—Snidow *v.* Board or Supervisors, 578.

Taxation.—See MUNICIPAL CORPORATIONS.

Unopened Street.—A city is not required to open or put all of its streets in a condition for public travel, and its customary liability to the public does not attach to a paper street which has neither been accepted, opened or improved. However, a street need not have been improved in order to hold the municipality liable. It is immaterial that a street has never been graded, if the municipality has recognized it as a public street and permitted its use as such. City of Roanoke *v.* Sartini, 415.

In the case at bar, the city council had established a street grade and a plan and survey of the city engineer, showing the street, was approved by the city council. However, an excavation had been made in the street and dirt

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STREETS AND HIGHWAYS—Continued.

Unopened Street—Continued.

removed and used in improving other streets. Subsequently, the street was graded, but this improvement stopped just short of the excavation, which made the rest of the street impassable for vehicles. For many years, however, the street had been habitually used by pedestrians and there was a well worn path showing such use. Held: That this was not a paper street. The city's acceptance of it as a highway for public use is clearly shown by its having graded on both sides of the excavation, by having exercised acts of ownership in the street, by the notice which must be imputed to it that the public was using it habitually as a footway, as well as by the erection of street signs indicating that it was one of the streets of the city; and all of this in addition to the formal recognition of the existence of the street by the resolutions of the city council. City of Roanoke *v.* Sartini, 415.

SUCCESSION TAXES.

Power of State.—The power of the State to impose inheritance taxes is unlimited. Posey *v.* Commonwealth, 551.

Rates.—By the act taxing inheritance (Acts 1916, chapter 484, page 812), it is manifest that the legislature intended to divide the persons who were to pay the taxes into two classes, and to fix the taxes they were to pay at two separate rates. One class was to pay no tax at all unless the estate exceeded fifteen thousand dollars, and the other was to pay on the whole estate, large or small. One was to pay at the rate of one *per centum*, the other at five *per centum*. After designating these two separate rates, the statute then declares, "The foregoing rates are for convenience termed primary rates," and the sliding scale of rates fixed by the statute is applicable to both classes. Posey *v.* Commonwealth, 551.

In the case at bar, plaintiffs in error were nieces and sole heirs of the decedent, from whom they inherited real estate in this State of the appraised value of $378,050. This inheritance was assessed with collateral inheritance taxes to the State to the amount of $41,707.50, which amount was arrived at by assessing the first $50,000 at the rate of five *per cent.*, the next $200,000 at the rate of ten *per cent.*, and the remaining $128,050 at fifteen *per cent.* This assessment was made under Acts 1916, chapter 484, page 812. The plaintiffs in error claimed that, under the act aforesaid, the as-

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SUCCESSION TAXES—Continued.

Rates—Continued.

sessment should have been at the flat rate of five *per cent.* on the whole $378,050. Held: That there was no error in the assessment. Posey *v.* Commonwealth, 551.

TAXATION.

Assessment.— See *infra*, "Erroneous Assessment;" "Omitted Taxes."

Officers Act Judicially.—Assessing officers act judicially in deciding when property is taxable and in placing a value upon it, but unlike regular judicial tribunals they are not confined to the consideration only of matters established before them in accordance with the general rules of evidence. They act and are required by statute, indeed, to act upon their own knowledge, or upon any means of information they may have, that is, upon their own opinion based upon such information as they may have; and although it is their duty to receive and they should not arbitrarily disregard the lists of the returns and statements of property owners, they are not bound thereby. Union Tanning Co. *v.* Commonwealth, 610.

Presumption in Favor of Assessment.—Though assessing officers have many inquisitorial powers of a drastic nature, under the statute law of Virginia, they are not required to exhaust all of those powers before they can make an assessment. If the *situs* of the subject of the tax is within the jurisdiction of the assessing officer, he has jurisdiction to make the assesment, and the assessment is presumed to be legal and valid in all respects, until the contrary is affirmatively shown. In such case, so far as the ascertainment of the subject of the assessment and its value is concerned, the assessing officer is required only to act in good faith in forming his opinion upon such information as he may have to go upon, however meagre. Union Tanning Co. *v.* Commonwealth, 610.

Property Valued Higher Than Other Like Property.— See *infra*, "Property Valued Higher Than Other Like Property."

Registration Fee of Corporations.—See CORPORATIONS.

Burden of Proof.— See *infra*, "Erroneous Assessment."

Cancellation.— See *infra*, "Cloud on Title."

Capital.— See *infra*, "Foreign Corporations."

Situs.—See *infra*, "Foreign Corporations."

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TAXATION—Continued.

Cemeteries.— See *infra*, "Exemptions."

Cloud on Title.— *Who May Maintain Suit to Cancel Deed.*— Where the Commonwealth has obtained a good title to land as against its original owner; where the latter or those claiming under him have not redeemed the land, nor any for them; and there has been a tax deed, which is void, purporting to convey the title of the Commonwealth to another; the title still remains in the Commonwealth, and the former owner or those claiming the land under him cannot maintain a suit to cancel and remove the deed as a cloud upon the title to the land. The former owner, or anyone claiming under him, should first redeem the land as if the void tax deed had never been executed. Dennis *v.* Robertson, 456.

Collateral Inheritance.—See SUCCESSION TAXES.

Constitutional Law.— See *infra*, "Exemptions."

Dispensing With Preliminary Steps of Sale.—See *infra*, "Sale."

Construction of Statute.— See *infra*, "Strict Construction of Statute."

Deed.— See *infra*, "Tax Deed."

Domicile.— See *infra*, "Foreign Corporations."

Due Process of Law.— See *infra*, "Property Higher Than Other Like Property."

Erroneous Assessment.— *Burden of Proof.*—The burden of proof is upon an applicant for the correction of an alleged erroneous assesment of taxes under Code of 1904, section 568. After the making of the assessment and the jurisdiction of the assessing officer who made it has been proved, the burden is not on the State or local subdivision to show by affirmative proof the existence of the specific items embraced in the assessment and the fair cash values thereof. Union Tanning Co. *v.* Commonwealth, 610.

The statute on the subject of omitted taxes, which was in force when the assessment complained of in the instant case was made in 1916 (Acts 1916, page 826, paragraph 7), provides that in contested cases the burden of proof shall be upon the taxpayer to show that he has made a full disclosure. The omitted taxes were for the years 1908 to 1915. Under this statute the assessment complained of was

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TAXATION—Continued.

Erroneous Assessment—Continued.

made, and the case arose after the statute was in force. Held: That this statute applied to the instant case. Union Tanning Co. *v.* Commonwealth, 610.

Full Disclosure by Applicant.—In the instant case the company did not make a full disclosure of its capital assessable for taxation in Giles county, and failed to show by its evidence in the trial court, nor did it otherwise appear from any evidence therein, that any items of the assessment complained of were illegal or erroneous in any particular. Therefore, there was no evidence in the instant case to rebut the *prima facie* case made by the assessment complained of, as to the whole or as to any of the items of assessment therein made. Hence, the mere absence of further proof on behalf of the defendants can avail the said company nothing. Union Tanning Co. *v.* Commonwealth, 610.

Issue Before Court.—The issue tendered by an application for the correction of an alleged erroneous assessment of taxes is not the narrow one of whether this or that item of the assessment is illegal or erroneous; but whether the taxpayer seeking relief has been assessed with more property or at a greater valuation than is legally assessable against him in the jurisdiction involved. Only by making a full disclosure of all his property in question assessable in such jurisdiction and the appearance from such proof that the assessment as a whole is illegal or erroneous, can the applicant overturn the whole assessment. This is true of cases involving current assessments, as well as of assessments of omitted taxes. Union Tanning Co. *v.* Commonwealth, 610.

Submission to Jurisdiction of Court.—An applicant to a court for the correction of an alleged erroneous assessment of taxes against him, submits himself to an equitable jurisdiction which the court exercises in such cases to ascertain and impose upon him an assessment of all the taxes with which he is assessable in the jurisdiction of the taxing power drawn in question. Union Tanning Co. *v.* Commonwealth, 610.

Exemptions.—*Cemeteries.*—The intangible property, in which the accumulated funds of a cemetery company, a corporation, are invested, is liable to taxation. Hollywood Cemetery *v.* Com., 106.

The burying grounds and the lots therein exclusively used for burial purposes, owned by a cemetery company or

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TAXATION—Continued.

Exemptions—Continued.

by its lot owners, are exempted from taxation. No other property owned by the company is exempted from taxation, and the legislature is itself prohibited from exempting from taxation any other property of cemetery companies. Hollywood Cemetery Co. *v.* Com., 106.

The legislature appropriated $8,000 to certain trustees and charged them with the duty of securing and executing a contract with the Hollywood Cemetery Company, binding that company to keep the graves of Confederate dead in the soldiers' section in Hollywood cemetery in "perpetual care," upon condition that the Commonwealth should be forever discharged from any further obligation to make any further appropriation to care for the graves of Confederate soldiers buried there. This trust was fully executed by the trustees, and the $8,000 paid over to the company. The company had absolute title to the fund and might use it for any purpose authorized by its charter. Held: That there was no force in the company's claim that this fund constituted a trust of which the State was the beneficial owner, and, therefore, it was exempt from taxation. Hollywood Cemetery Co. *v.* Com., 106.

Constitutional Law.—Under the Constitution of 1869, by section 3 of Article X, the legislature had authority to exempt certain classes of property, but since the Constitution of 1902 became effective all tax exemptions are thereby fixed, and there can be no other such exemptions. The most casual consideration of section 183 of the Constitution of 1902 shows clearly and distinctly the purpose of the convention thereafter to make it impossible for the legislature to create any exemptions from taxation, for it not only provides in detail affirmatively just what property can be exempted from taxation, but expressly denies the legislature the power to add thereto, and specifically prohibits the exemption of any other property. No historical discussion of the provisions of former Constitutions or legislation can make obscure the clear meaning of section 183 of the Constitution, so far as it affects this question. Hollywood Cemetery Co. *v.* Com., 106.

Foreign Corporations.—*Business Domicile—Place of Business.*—The words *principal place of business* in Code of 1904, section 492, providing that the intangible personal property not otherwise taxed of *all* corporations shall be listed to the corporation *at the principal place of business* of the corpora-

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TAXATION—Continued.

Foreign Corporations—Continued.

tion, and the words *business domicile*, used in Acts 1916, page 660, in designation of the *situs* of intangible personal property of foreign corporations for assessment for taxation have the same meaning and there is no conflict between the statutes. Union Tanning Co. *v.* Commonwealth, 610.

Capital.—The omitted capital of a foreign corporation employed in business in Virginia as of February 1, 1908, to 1915, inclusive, was legally assessable for taxation in Giles county in 1916, where it appeared that it maintained a place of business in Giles county, and in its return taxes for 1916 listed all of its capital stock employed in business in Virginia as assessable for taxation at Narrows, in Giles county, although the company was engaged in busines at three places in Virginia and there was no express proof as to in which of these places the principal office of the company was located. Union Tanning Co. *v.* Commonwealth, 610.

The capital of a foreign corporation doing business in Virginia is intangible personal property and as such has been assessed and taxable in Virginia since long prior to 1908, under the statute law of Virginia. Union Tanning Co. *v.* Commonwealth, 610.

Domicile—Principal Place of Business.—A foreign corporation doing business at more than one place in the State has the option to make a *bona fide* choice, *ante motam litem*, of any one of such places, as its principal place of business in this State, just as a natural person with more than one place of residence has the option to make any one of them his domicile. Equally, the *locus* of the domicile (quasi domicile in the former and actual domicile in the latter case) is a matter of act and intention. Both must concur to fix the domicile. Union Tanning Co. *v.* Commonwealth, 610.

Given the existence of the actual doing of business by a foreign corporation at a particular place in the State, its intention or *animus*, on the subject is decisive. If it so intends, that intention, together with the concurrent existence of the actual doing of such business at such place, is decisive, and fixes that place as the principal place of business of the corporation in this State. Union Tanning Co. *v.* Commonwealth, 610.

If there is a statute prescribing how the intention of a foreign corporation to fix its principal place of business at a certain place shall be manifested, the statute is conclusive on the point, but section 1104, Code of 1904, requiring

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TAXATION—Continued.

Exemption—Continued.

Domicile—Continued.

foreign corporations to have an office in the State at which claims may be audited, settled and paid, and to designate an agent upon whom process may be served, does not require a foreign corporation to set forth where its principal office in this State is located. Union Tanning Co. *v.* Commonwealth, 610.

As in this State a foreign corporation is not required by statute to declare where it intends its principal place of business to be, the courts must ascertain whether such intention exists or existed at any particular time or as to any particular place by evidence, which may be furnished by facts and circumstances touching the action of the corporation which may disclose the existence of such intention. The courts have often the same duty to perform in deciding upon the domicile of natural persons. No advance declaration on the subject has as yet been required of them by statute. Union Taning Co. *v.* Commonwealth, 610.

The fact that in the instant case the company made its return in 1916 in Giles county for the taxation at Narrows in such county, of all of its capital employed in business in Virginia, outside of that county as well as within it, was equivalent to a declaration by it that its intention or *animus* was that Narrows in such county was, as of February 1, 1916, the *situs* for taxation of all of such capital, and in the absence of any evidence that such intention was one newly formed by the company, the inference is warranted that such intention was not newly formed in 1916, but existed in former years, and that Narrows in Giles county was for such years, as well as 1916, the principal place of business or business domicile of the company, and the legal *situs* of all its capital for taxation in this State. Union Tanning Co. *v.* Commonwealth, 610.

Situs of Capital.—The legal *situs* of intangible personal property—*i. e.*, the capital—of corporations, both foreign and domestic, taxable in this State, for the years 1908 to 1916, inclusive, in question, was and is fixed for current yearly assessments, by section 492 of the Code of 1904, which provides that the intangible personal property not otherwise taxed of *all* corporations "shall be listed to the corporation by the principal accounting officer and *at the principal place of business* of the corporation. Union Tanning Co. *v.* Commonwealth, 610.

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TAXATION—Continued.

Identity of Land Sold.—See *infra*, "Tax Deed."

Case at Bar.—In the instant case the clerk's list, the treasurer's notice of sale and report of sale required by the resale act (Acts 1906, page 41), were alike fatally defective in that they contained no description of the land in question. Only the name of the original landowner and the amount of the delinquent tax and levy stated, were given in the clerk's list. And with respect to the identity of the land only that information was given by the treasurer's notice of sale and report of sale. There was nothing in such proceedings to identify the land listed and sold, as the land to which the Commonwealth had title. To establish a valid sale of the land to him by the Commonwealth it was necessary for the appellant (the purchaser) to show such identity by the record of such proceedings, through which he must derive title, and the circumstances appearing by evidence *in pais* that the former landowner was not assessed with any other land, is immaterial because the said resale act (Acts 1906, page 41), does not permit the appellant to derive title by facts *in pais*, but only by the proceedings of record required by the statute. Dennis *v.* Robertson 456.

Code of 1904, Sections 662 and 663.—Under Code of 1904, sections 662 and 663, the identity of the land to which the Commonwealth acquired title is fixed by the description of it contained in the list returned by the treasurer at the same time that he made his report of the sale of it to the Commonwealth. To the acquisition by anyone from the Commonwealth of its title to such land, by purchase under the resale act (Acts 1906, page 41), it is essential for many obvious reasons, that the identity of the land proposed to be purchased as the same land to which the Commonwealth had previously acquired title and proposed to sell, should be made to appear by a sufficient description of it for that purpose in the proceedings required by the act for the resale, as well as in the deed to the purchaser, required by such act. Dennis *v.* Robertson, 456.

Correspondence With Description in Anterior Proceedings.—If the description in the deed contains substantially the same description as is contained in the anterior proceedings, that description may be enlarged, added to (as is authorized by section 10 of said resale act [Acts 1906, page 41]), by information derived from some source other than such proceedings; but the entire absence of any description

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TAXATION—Continued.

Identity of Land Sold—Continued

Correspondence With Description in Anterior Proceedings —Continued.

in such proceedings cannot be supplied by the description contained in the deed, for that would be to base the deed, not upon such proceedings, as the statute requires for its validity, but upon information *aliunde*, which whether correct or not, could not empower the officer of the law executing the deed in the exercise of a naked power to make a valid execution of it so as to pass title. Dennis *v.* Robertson, 456.

Extraneous Evidence.—Extraneous testimony is always admissible to apply the description in a tax deed, as in other deeds, to the subject of it, so as to identify the land on the ground; but this is a wholly different proposition from the admission of such testimony to identify the subject of a tax deed as the same which might or should have been described in the proceedings anterior to such deed required by statute to authorize the deed, but which description was not contained in such anterior proceedings. Dennis *v.* Robertson, 456.

Section 10 of the Resale Act.—Section 10 of the resale act (Acts 1906, page 41), does not authorize a disregard of the rule that such a description as will identify the subject of a tax sale must be contained in the proceedings required by statute anterior to the tax deed. Such section contemplates that the clerk's list should contain at least the same description of the land as that contained in the report of the treasurer of its sale to the Commonwealth, or substantially that description, so as to identify the land, as the same as that to which the Commonwealth has title and which is proposed to be sold under the resale act (Acts 1906, page 41), such description may be enlarged by information derived from the purchaser, but its entire absence cannot be supplied by such information. Dennis *v.* Robertson, 456.

Variance.—Even a substantial variance between the description in the deed and the description in the anterior proceedings (*a fortiori* an entire lack of such description in the anterior proceedings) will be fatal to the deed. Dennis *v.* Robertson, 456.

Inheritance Tax.—See SUCCESSION TAXES.

Intangible Personal Property.—It is only in the absense of statute on the subject that the rule with respect to the *situs*

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TAXATION—Continued.

Intangible Personal Property—Continued.

of intangible personal property following the domicile of its owner applies. The legislature has plenery power to provide that such property of a non-resident corporation (and of non-resident natural persons) shall be assessable for taxation at any place or places it may designate, regardless of the true domicile of the corporation or person taxed. By such designation it makes such place or places the quasi-domicile—*i. e.*, the domicile for purposes of taxation in this State—of such corporations or natural persons. It gives to such quasi-domicile the same effect *quoad* purposes of taxation as if it were the true domicile. Union Tanning Co. *v.* Commonwealth, 610.

Interest.—See *infra*, "Omitted Taxes."

Municipal Taxation.—See MUNICIPAL CORPORATIONS.

Omitted Property.—See *infra*, "Foreign Corporations."

Omitted Taxes.—See *infra*, "Erroneous Assessment."

Correction of Assessment.—Code of 1904, section 508, amended by Acts 1916, page 826, paragraph 7, which provides that where the taxpayer has made a full disclosure of his taxable property, an assessment made in good faith, although under a misapprehension of the law, shall be final as to valuation, has no application to a corporation which failed to make a full disclosure of its taxable property. Union Tanning Co. *v.* Commonwealth, 610.

Evidence Before Examiner of Records.—The fact that the examiner of records had no evidence before him at the time he made the assessment, in question, of the exact total amount of the omitted capital to be assessed or of the specific items of it, or of what proportions of it were being employed at the several places of business of the company in the State of Virginia, but arrived at the amounts he assessed merely from the opinion he entertained that the company employed in its business during the preceding years in question no less amount of capital than it returned for taxation in 1916, and from a comparison of the assessments made against said company in Giles county for the preceding years in question with its return for taxation made by it in 1916, did not invalidate the assessment. Union Tanning Co. *v.* Commonwealth, 610.

Interest.—The assessment of omitted taxes in the case at bar having been made when Act of 1916, page 826, was in

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TAXATION—Continued.

Omitted Taxes—Continued.

Interest—Continued.

force, which contained no provision giving discretionary powers to the assessing officer, or to the court, on the subject of interest (the omitted property not having been voluntarily reported for taxation on or before August 1, 1916, as provided for in section 8 of such statute), as did section 508 of the Code of 1904 as it at one time existed prior to its amendment by the enactment in 1916, the taxes in question must bear interest. Union Tanning Co. *v.* Commonwealth, 610.

Penalties and Interest.—Under the law (section 603, Code of 1904, as amended by Acts 1906, page 31), two obligations rest on the taxpayer, one is to see that his property is properly assessed, and the other is to pay the tax thereon by December 1st following, if he would escape the penalty. If a taxpayer who makes a full and correct return of his property to the commissioner of the revenue and fails to pay the tax in time cannot escape the penalty, then *a fortiori* a person or corporation subject to taxation who refuses or fails to make a return should be subject to the same penalty as one who made a return but failed to pay the taxes. Harrison, Ex'or, *v.* Commonwealth, 101.

Remission of Interest and Penalties.—Section 508 of the Code of 1904, as amended by the act of March 22, 1916, (Acts 1916, chapter 491), provides that when omitted intangible personal property, money and incomes are voluntarily reported on oath to the examiner of records, on or before August 1, 1916, on forms prescribed and such reports are found correct, and the taxes thereon paid before November 1, 1916, the taxes paid shall not be subject to interest or penalty. To entitle a taxpayer to the benefits of the provisions of this section, he must make it appear that he voluntarily reported the omitted property on oath to the examiner of records on or before August 1, 1916, on forms provided by the Auditor, and that the report was found correct. In the case at bar, it was held that the applicant for relief had not met these requirements, and had not made such effort to report the omitted property as could be held tantamount to a compliance with the statute. Harrison, Ex'or, *v.* Commonwealth, 101.

Penalties.— See *infra*, "Omitted Taxes."

Principal Place of Business.— See *infra*, "Foreign Corporations."

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TAXATION—Continued.

Property Valued Higher than Other Like Property.—A systematic, intentional discrimination, by those administering the tax system of a State (whether as directed by statute or contrary to statute), against a person, by an assessment of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, is a denial to such person of due process of law and the equal protection of the laws guaranteed to him by the State and federal Constitution. Union Tanning Co. *v.* Commonwealth, 610.

But where there has been no discrimination between persons or classes of persons, but the property of the like kind of all persons in a given jurisdiction has been under-valued in its assessment for taxation contrary to law, a correction made of such assessment of any individual property owner according to law, is not a violation of the constitutional provisions as to due process of law or the equal protection of the laws, and evidence in a proceeding to correct an erroneous assessment that the property was assessed on a higher scale of valuation than other like property was properly excluded. Union Tanning Co., *v.* Commonwealth, 610.

Remission of Interest and Penalties.—See *infra*, "Omitted Taxes."

Removal of Cloud.—See *infra*, "Cloud on Title."

Resale Act.—See *infra*, "Identity of Land Sold."

Under the resale act (Acts 1906, page 41), section 12, the requirements of the preceding portions of such act are as much conditions precedent to the validity of the deed, as are the non-existence of the facts mentioned in said section 12 as the grounds on which the validity of the deed may be assailed. Dennis *v.* Robertson, 456.

The resale act (Acts 1906, page 41), section 10, provides that the deed shall set forth all the facts appearing of record in the clerk's office in relation to the sale. The effect of that provision and of section 12 of the act is to make the recitals in the deed, made and recorded under such act, *prima facie*, but not conclusive evidence of the existence of the jurisdictional steps recited. Dennis *v.* Robertson, 456.

Recission, Cancellation and Reformation.— See *infra*, "Cloud on Title;" "Sale."

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TAXATION—Continued.

Road Tax.—See MUNICIPAL CORPORATIONS.

Sale.—See *infra*, "Tax Deed."

Conveyance of Land Previously Acquired by Commonwealth.—The principles as set forth in syllabus 1 apply to a tax deed which undertakes to convey the title of the Commonwealth (acquired by it at a previous sale of the land for delinquent taxes) to a purchaser from the Commonwealth, as well as to such deeds undertaking to convey the title of the original owner of the land to a purchaser at a treasurer's sale of the land for delinquent taxes. Equally in both cases, the offcer of the law executing the deed to the third person, who is the purchaser, executes a naked power, and any steps which the statute requires a third person to take in order to acquire the title of the Commonwealth must be strictly complied with, unless the legislature dispenses with that compliance. The State is not to be divested of its title save in the manner prescribed by the legislature. Dennis *v.* Robertson, 456.

Dispensing With Preliminary Steps.—The preliminary steps to a tax sale for delinquent taxes by a treasurer, necessary to afford the landowner due process of law, cannot be dispensed with even by express legislative enactment. They are necessary and indispensable to divest the former owner of his title to the land. But a different rule prevails where the Commonwealth has obtained a valid title to land and the deed is to a purchaser from it. In such case, the original owner having been divested of his title by due process of law and such title having become vested in the Commonwealth, the latter may do what it may will with its own. The former owner no longer has any title or right to the land or with respect thereto. Hence, where a tax deed conveys a title from the Commonwealth, the statute may provide that, when such a deed to a purchaser from it is once made, as prescribed by statute, its validity cannot be questioned by the former owner of the land on any grounds concerning any of the proceedings subsequent to the acquisition of the title by the Commonwealth, or on any grounds concerning the proceedings antecedent to such acquisition of title which do not go to the validity of the title acquired by the Commonwealth, except such as the statute may itself allow to be drawn in question. Dennis *v.* Robertson, 456.

However, save to the extent that they may be dispensed with by statute, the proceedings which may be prescribed

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TAXATION—Continued.

Sale—Continued.

Dispensing With Preliminary Steps—Continued.

by statute as steps to precede the execution of such a tax deed, although they are to be taken after the acquisition of the title by the State, are nevertheless steps which are jurisdictional, and are conditions precedent to the validity of the deed. It becomes then, in every case involving the validity of a tax deed, purely a question of the construction of the statute which is relied on to give the particular force and effect which may be claimed for such a tax deed. Dennis *v.* Robertson, 456.

Identity of Land Sold.—See *infra*, "Identity of Land Sold."

Who May Maintain Suit to Cancel Deed.—Where the Commonwealth has obtained a good title to land as against its original owner; where the latter or those claiming under him have not redeemed the land nor any for them; and there has been a tax deed, which is void, purporting to convey the title of the Commonwealth to another; the title still remains in the Commonwealth, and the former owner or those claiming the land under him cannot maintain a suit to cancel and remove the deed as a cloud upon the title to the land. The former owner, or anyone claiming under him, should first redeem the land as if the void tax deed had never been executed. Dennis *v.* Robertson, 465.

Situs.—See *infra*, "Foreign Corporations;" "Intangible Property."

Strict Construction of Statute.—Laws imposing taxes are strictly construed against the taxing power and in favor of the citizen and they are never held to have been imposed unless by express statutory enactment or by necessary implication therefrom. Elliott's Knob I., Etc., Co. *v.* Corp. Com., 63.

Succession Taxes.—See SUCCESSION TAXES.

Tax Deed.—*Conditions Precedent to Validity of Deed.*—Under the resale act (Acts 1906, page 41), section 12, the requirements of the preceding portions of such act are as much conditions precedent to the validity of the deed, as are the non-existence of the facts mentioned in said section 12 as the grounds on which the validity of the deed may be assailed. Dennis *v.* Robertson, 456.

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TAXATION—Continued.

Tax Deed—Continued.

Deed from Commonwealth—Sections 661 and 666, Code of 1904.—Some expressions used in the case of *Thomas* v. *Jones*, 94 Va. 756, 27 S. E. 813, and in other Virginia cases, did at one time give color to the view that where a tax deed is made to a purchaser from the Commonwealth under section 666 of the Code of 1904, as it originally stood or as amended, its validity could not be questioned, except upon the grounds specified in section 661 of the Code of 1904, as it originally stood or as amended, since said section 666 provides that the provisions of said section 661 should apply to deeds made under authority of the former section. But it is now well settled that the true construction of said sections 666 and 661 of the Code of 1904, as they originally stood and as amended, is, that the proceedings required by said section 666 of the Code of 1904 are conditions precedent to the validity of a deed thereunder. Dennis *v.* Robertson, 456.

Effect of Tax Deed.—A tax deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposes upon them—every condition essential in its character—then the deed becomes conclusive evidene of title to the grantee, according to its extent and purport. This is true because the officer of the law who executes the tax deed does so in the exercise of a naked power, not coupled with an interest; and, unless made so by statute, the recitals in the deed are not even *prima facie* evidence of the existence of the conditional facts aforesaid. Dennis *v.* Robertson, 456.

Identity of Land Sold.—See *infra*, "Identity of Land Sold."

Recitals as Evidence.—The resale act (Acts 1906, page 41), section 10, provides that the deed shall set forth all the facts appearing of record in the clerk's office in rela-

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TAXATION—Continued.

Tax Deed—Continued.

Recitals—Continued.

tion to the sale. The effect of that provision and of section 12 of the act is to make the recitals in the tax deed, made and recorded under such act, *prima facie*, but not conclusive evidence thereof, and such jurisdictional steps, steps recited. Dennis *v.* Robertson, 456.

Recitals—Sections 666 and 661, Code of 1904.—The effect of sections 666 and 661, Code of 1904, is to make the recitals in the tax deed made and recorded under section 666 have the force and effect of *prima facie* evidence of the existence of the jurisdictional steps recited, but not conclusive evidence thereof, and such jurisdictional steps, in such case, are steps required by said section 666 to be taken subsequent to the acquisition of the title by the Commonwealth and preceding the execution of the deed under such section. Dennis *v.* Robertson, 456.

TENDER.

Specific Performance.—See SPECIFIC PERFORMANCE.

THREATS.

Homicide.—See HOMICIDE.

TIMBER. See TREES AND TIMBER.

TREES AND TIMBER.

Injunctions.—A bill to enjoin defendants from cutting and removing timber, which shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably necessary for farm uses, and alleges the insolvency of the defendants, is not demurrable. Cumbee *v.* Ritter, 448.

Interest on Deferred Payments.—The contract in the instant case provided that the note for the deferred purchase money should be made payable six months from date, *i. e.*, six months from the date of said contract of March 14, 1917, *i. e.*, it was to be made payable September 14, 1917. Had the note been executed in accordance with such contract it would have borne no interest unless and until default had been made in its payment on its due date, September 14, 1917. Adams *v.* Hazen, 304.

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TREES AND TIMBER—Continued.

Merchantable Timber.—In a contract for the sale of "all merchantable timber" upon a certain tract of land, "merchantable timber" is all timber—whatever its size—that had, at the date of the contract, or may have during the life of the contract, a commercial value in that locality, for the purpose of manufacture into lumber, or for any other purpose. Hence the term "merchantable" used in such contract is one that the law can define, and the contract in that behalf has "legal subject matter." Adams *v.* Hazen, 304.

Sales.—See *infra*, "Interest on Deferred Payments;" "Merchantable Timber;" "Time for Removal of Timber."

Specific Performance.—See *infra*, "Time for Removal of Timber."

Time for Removal of Timber.—It is well settled that where no time for the removal of timber is specified in timber contracts, the contracts will be construed as providing, by implication, for "a reasonable time" for such removal. A contract, therefore, for the sale of timber, which does not fix any time for the removel of the timber, is not incomplete, nor unenforceable, because of this omission. Adams *v.* Hazen, 304.

TRESPASS.

Equity.—The general rule is that in the absence of some peculiar equity arising out of the conduct, situation or relation of the parties, courts of equity are without jurisdiction to settle disputes as to title and boundaries of land. But where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts of wrong are done or threatened to be done, or the injury is or would be irreparable, whenever indeed the remedy at law is or would be inadequate, a court of equity will put forth its restraining hand and enjoin the perpetration of the wrong and prevent the injury. Cumbee *v.* Ritter, 448.

Injunctions.—A bill to enjoin defendants from cutting and removing timber, which shows a *prima facie* title in the complainant, the destruction of timber of special value and reasonably necessary for farm uses, and alleges the insolvency of the defendants is not demurrable. Cumbee *v.* Ritter, 448.

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TRIAL.

Order of Proof.—See ORDER OF PROOF.

Striking out Evidence.— See EVIDENCE.

UNITED STATES.

Claims.—See *infra*, "Finding of United States Court of Claims."

Limitation of Attorney's Fee.—Defendant by a contract dated April 18, 1911, agreed to pay plaintiff in consideration of his professional services in the prosecution of defendant's claim against the government of the United States for property taken by the federal forces during the late civil war, a sum equal to fifty per cent. of the amount which was collected upon said claim. Held: That the contract was void under the omnibus claims act, section 4, 38 Stat. L., p. 996, and this although the service had been rendered by plaintiff and a finding of the court of claims in favor of the claim obtained and a certification thereof to Congress before the omnibus claims act went into effect. Calhoun *v.* Massie, 673.

Courts.—*Conflict of Jurisdiction Between State and United States Courts.*—Where the State court and the United States court both have jurisdiction of a person accused of crime, the tribunal that first takes jurisdiction retains it to the exclusion of the other, until its duty with respect to the matter has been fully discharged and the jurisdiction exhausted. The rule applies both in civil and criminal cases. Bowling *v.* Commonwealth, 340.

If a person is in the actual custody of the United States for a violation of its laws, no State can by *habeas corpus*, or any other process, take such person from the custody of the federal tribunal or officer. So on the other hand, a person in custody under the process or authority of a State, is, by express enactment, beyond the reach of the federal courts or judges. Judiciary act, section 14; act March 2, 1833, section 7; 4 Stat. at Large, 634. Bowling *v.* Commonwealth, 340.

Finding of United States Court of Claims.—A finding of the court of claims favorable to a claim against the government of the United States for property taken by the federal forces during the late civil war, and the certification of the same to Congress, though authorized by statute, is not a judgment, and creates no vested rights. Calhoun *v.* Massie, 673.

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UNITED STATES—Continued.

Finding of United States Court of Claims—Continued.

Where there has been a finding of the court of claims in favor of a claim and a certification thereof to Congress, the government had the same right in law to reject the claim in toto, or to attach conditions to its payment when the act of 1915 (omnibus claims act, section 4, 38 Stat. L., page 996) was passed, as it would have had if there had been no statute authorizing the court of claims to consider and report upon the matter. The condition, therefore, incorporated in the act of 1915 limiting the fees of attorneys or agents for services rendered to twenty per cent. of the amount recovered, was not unconstitutional. Calhoun *v.* Massie, 673.

VARIANCE.

Appeal and Error.—An objection that the trial court erred in permitting the plaintiff to recover upon a different case from that made by his declaration, cannot be made for the first time on appeal, as it involved the ordinary question of a variance between the declaration and the proof. Lynchburg Tr. & L. Co. *v.* Gordon, 198.

Larger Proof May Include the Smaller.—It does not follow because testimony exceeds in its effect what it is incumbent on the party introducing it to prove, that it is inadmissible, or does not tend to prove a lesser issue of fact. The larger proof may include proof of the lesser issue of fact; as, if it were alleged that A did not injure B in a certain personal encounter between them at a certain time and place, and the proof should be that no personal encounter ever occurred between A and B. So in the instant case the allegation of the declaration was not that for the defendant to prescribe and apply any X-ray treatment whatever for the eczema of plaintiff was malpractice; but only that to prescribe and apply a certain X-ray treatment which was in fact applied was malpractice. But proof of the former would necessarily include proof of the latter fact. Hunter *v.* Burroughs, 113.

VENDOR AND PURCHASER. See JUDICIAL SALES.

Bona Fide Purchaser.—See *infra*, "Complete Purchaser."

Complete Purchaser.—One claiming to be a complete purchaser must aver "a valuable consideration and the actual payment thereof," and "must explicitly deny notice." If a

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VENDOR ANR PURCHASER—Continued.

Complete Purchaser—Continued.

subsequent purchaser receive notice of a prior conveyance or incumbrance before *both* of these affirmative acts are accomplished, he must forbear to proceed further until the equity is inquired into, or else he takes subject thereto. Whatever he does after notice is done *mala fide* and cannot avail him. And this is in consonance with justice as well as in strict analogy to equitable principles. It rests upon the reasonable maxim, *"qui prior in tempore, prior est in jure."* Gollehon *v.* Gollehon, 504.

A wife suing her husband for divorce filed a supplemental bill making her husband's brother a party and alleging that her husband had conveyed his real estate to his brother with the fraudulent intent of relieving the land from the incumbrances that had been and thereafter might be fixed upon it in the divorce proceedings. The evidence showed that the brother had notice of the original suit for divorce, but did not fix upon him the knowledge of or participation in the fraudulent motives and acts of the husband. The evidence showed, however, that the brother was not a *complete purchaser* of the land until after he was implicated in the supplemental bill, as at that time he still owed a certain amount of the purchase money, and to that extent the permanent alimony allowed by the decree in the divorce suit constituted a charge on the lands in his hands. Gollehon *v.* Gollehon, 504.

Conditional Contract.—A memorandum agreement for the sale of a farm, after stating the consideration and terms of payment, provided that, whereas it was understood by both the vendor and vendee that there was pending a certain suit against the vendor covering the question of possession of the farm, it was therefore, understood and agreed that the vendor was to deliver immediate possession of the farm as soon as the aforesaid suit was either settled or dismissed, at which time the sale was to be closed. The concluding clause of the memorandum provided that in the event the vendor did not deliver the possession of the farm, he should reimburse the grantee any and all sums paid on account of the purchase money. Held: That the contract was a conditional one, only to become effective in the event the complainant in the pending suit was divested of possession and interest in the farm, and stipulating on its face the damages to be paid the grantee should the complainant not be so divested, and where a sale made by

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VENDOR AND PURCHASER—Continued.

Conditional Contract—Continued.

the complainant in said suit was confirmed by the court, that such confirmation rendered null and void and of no effect the conditional contract. Kincheloe *v.* Taylor, 178.

Contract of Sale.—*Waiver.*—Under a contract for the sale of land, the vendees refused by letter the deed tendered them by the vendors on the ground that its description of the land did not definitely identify it, but stated that if the vendors were "willing to furnish us a plat and to make the same a part of the deed, which plat will definitely show the lines, we are willing to pay the purchase price agreed upon." Held: That whatever might have been the rights of the vendees under the contract, they waived everything but a single point by this letter and staked their whole case on their right to demand a deed containing a better description of the land than that contained in the deed tendered. Wolford *v.* Jackson, 280.

Deeds.—See DEEDS.

Description of Land.—Where under a contract of sale, the vendors tendered a deed containing the same description of the land as that contained in the contract of sale and in every deed previously conveying the land, and the land could be readily and adequately identified from the description given, the vendees could not refuse to receive the deed on the ground that the description of the land was insufficient, in that it did not show the number of feet or chains on the boundaries, and demand a survey and plat to be made a part of the deed. Wolford *v.* Jackson, 280.

Evidence to Support Parol Sale of Land.—Branham *v.* Clinchfield Coal Corp., 346.

Joint Adventures.—See JOINT ADVENTURES.

Merger.—See MERGER.

Notice of Prior Claims.—See *infra*, "Complete Purchaser."

Parol Sale of Land.—In the instant case plaintiffs attempted to set up a parol sale of the land in question and payment of the purchase money. No such case, however, was made by the pleadings; and if enforceable (Code 1904, section 2840), the admissible evidence in support of the contention is far too indefinite, vague and uncertain to warrant a decree thereon in favor of the plaintiffs. Branham *v.* Clinchfield Coal Corp., 346.

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VENDOR AND PURCHASER—Continued.

Payment.—A sale of timber provided for one-half cash payment "when transfer papers are properly gotten up. Held: That a reasonable construction of the words "transfer papers properly gotten up" is that a conveyance in writing, properly acknowledged for recordation according to law, was within the contemplation of the parties. Adams *v.* Hazen, 304.

Rights of Purchaser.—See *infra*, "Complete Purchaser."

Specific Performance.—See SPECIFIC PERFORMANCE.

Sufficiency of Deed.—See DEEDS.

Timber.—See TREES AND TIMBER.

Transfer Papers.—A sale of timber provided for one-half cash payment "when transfer papers are properly gotten up." Held: That a reasonable construction of the words "transfer papers properly gotten up" is that a conveyance in writing, properly acknowledged for recordation according to law, was within the contemplation of the parties. Adams *v.* Hazen, 304.

Waiver.—See *infra*, "Contract of Sale."

VERDICT.

Correction.—It is the duty of the trial courts to require the verdicts of juries to be put in approved form in order to effectuate their true intent and meaning, and hence where the jury reported a verdict written upon a piece of paper in the following words: "We, the jury, find for the plaintiff and fix the damages due by the defendant to be twelve hundred dollars," there was no error where the verdict was in open court written upon the declaration and signed by the foreman in these words: "We, the jury, find for the plaintiff on the issues joined, and fix his damages at twelve hundred dollars." Manor and Others *v.* Hindman, 767.

Direct Verdict.—*Instructions Not Covering Whole Case.*—A peremptory instruction granted by the court on request of plaintiff, directing a verdict for plaintiff, which entirely ignores defendant's theory of the case, and omits all evidence tending to sustain it, is in contravention of the settled doctrine that an instruction that in substance directs a verdict must cover every phase of the case that is supported by evidence. Baylor *v.* Hoover, 659.

In a proceeding by motion against husband and wife to recover for the negligent death of plaintiff's intestate; an instruction concluded with the direction that the jury should

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VERDICT—Continued.

Directing Verdict—Continued.

Instruction Not Covering Whole Case—Continued.

find for the plaintiff against both defendants, if they believed from the evidence the facts upon which the instruction was predicated. The rule is that where an instruction so concludes it is bad unless it covers every phase of the case that is supported by evidence. The instruction in question ignored that rule, in that it left out of consideration the question of the contributory negligence of plaintiff as affecting his right to recover at all, and therefore should have been refused. Ratcliffe *v.* McDonald's Adm'r, 721.

Partial View of Evidence.—It is error to give an instruction directing a finding for the plaintiff or the defendant on an incomplete or partial view of the evidence. Wilkins *v.* Henderson, 275.

In the instant case, the defendant relied upon two defenses: First, that the land in controversy was within the boundaries called for by her deed, and, second, that if not within such boundaries, the defendant had acquired title by adverse possession. Two instructions were tendered by the plaintiff and rejected by the court. Each of the instructions asked was applicable solely to the defense of title by adverse posession, and, although the land in controversy may have been within the boundaries of the defendant's deed, and passed to her by her deed, yet each of these instructions directed a verdict in favor of the plaintiff. The land in controversy was a parcel of a large tract, much of which was arable land, and had been in the possession of the defendant for a long number of years. The defendant entered into possession of a part of the tract, claiming title to the whole, according to the boundaries claimed in her deed, thus extending her possession to the entire tract, including the land in controversy, if it was within her boundary. As the plaintiff did not claim title by adverse possession, the defendant was entitled under the evidence to a verdict in her favor if the land in controversy was within the calls of her deed, and yet, each of the instructions directed a finding for the plaintiff unless defendant established her claim of title by adverse possession. Held: That this was manifest error, and justified the court in refusing to grant the instructions. Wilkins *v.* Henderson, 275.

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VERDICT—Continued.

Peremptory Instructions.—See *infra*, "Directing Verdict."

Remittitur.—See REMITTITUR.

VESTED RIGHTS. See CONSTITUTIONAL LAW.

WAIVER

Parties.—See PARTIES.

Vendor and Purchaser.—See VENDOR AND PURCHASER.

WATERS AND WATERCOURSES.

Act of God.—Where mill owners, in the accustomed operation of the mill, had the right to divert the water flowing through the tail-race of the mill into a waste-race at intervals for repairs, the circumstance that a cave occurred on the channel of the waste-race, in which the water when diverted to the waste-race sank so that it no longer passed on for the use of the lower proprietors, was not due to any act of the mill owners, and, therefore, did not deprive them of their previously acquired rights to divert the water from the tail-race to the waste-race. Such occurrence falls within what is defined in the quaint language of the common law as an "act of God," for which no man can be held responsible. Kirk *v.* Hoge, 519.

Constitutional Law.—The power of the sovereign State or nation is perpetual, not exhausted by one exercise, and all privileges granted in public waters are subject to that power, the exercise of which is not the taking of private property for public use, but only the lawful exercise of a governmental power for the common good. Darling *v.* City of Newport News, 14.

Diversion of Waters.—See *infra*, "Act of God."

Easements.—See MILLS AND MILLDAMS.

Grant.—See *infra*, "Constitutional Law."

Mills and Milldams.—See MILLS AND MILLDAMS.

Natural and Artificial Watercourses.—The natural corporeal right of riparian owners to the enjoyment of an uninterrupted flow of water is possessed by riparian owners of land on natural channels of watercourses only. Such right does not exist in the water flowing in an artificial channel. The right, of those owning land bordering upon or through which artificial channels pass, to the use of the water

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VESTED RIGHTS—Continued.

Natural and Artificial Watercourses—Continued.

flowing therein, is not a natural right, nor a corporeal right, but an incorporeal right, which can be acquired only by grant, express or implied, or by prescription. Kirk *v.* Hoge, 519.

Pollution.— *Tidal Waters—Sewers—Municipal Corporations—Oysters—Damnum Absque Injuria.*—A municipal corporation situated on an arm of the sea, adjacent to tidal waters, has the right to use such waters for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not create a public nuisance, and any injury occasioned thereby to private oyster beds is *damnum absque injuria.* Darling *v.* City of Newport News, 14.

Distinction Between Non-Navigable Stream and Tidal Navigable Bodies.—There is a marked and well defined distinction between the pollution of a small non-navigable stream, and the pollution of large tidal navigable bodies of salt water, for the reason that in the first case the bed of the stream and the waters are owned by the reparian owners while in the latter case the bed of the navigable, tidal salt water and the waters themselves are owned and controlled by the State, for the use and benefit of all the public, subject only to navigation. It is for the State to say what uses shall be made thereof and by whom, subject always to the right of the public, and for the State, through the legislative branch of the government, to say how much pollution it will permit to be emptied into and upon its waters, so long as the owners of the land between low water and high water mark are not injured. Darling *v.* City of Newport News, 14.

Rights of Oyster Planter.—Under the Virginia statute (Acts 1910, chapter 343), as construed by the Supreme Court of Appeals the oyster planter takes his right to plant and propagate oysters on the public domain of the Commonwealth in the tidal waters, subject to the ancient right of the riparian owners to drain the harmful refuse of the land into the sea, which is the sewer provided therefor by nature; while another statute (Acts 1916, page 51) provides for the examination of such oyster-planting grounds so as to discover polluted areas, and prohibits the taking of oysters therefrom except for the purpose of removing them to unpolluted waters, there to remain until cleansed, purified and made suitable for human food. Darling *v.* City of Newport News, 14.

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VESTED RIGHTS—Continued.

Prescription.—See MILLS AND MILLDAMS.

Riparian Rights.—See *infra*, "Natural and Artificial Watercourses.

WILLS.

Advancements.—See *infra*, "Power to Make Advancements."

Children.—See *infra*, "Gift for Benefit of Wife and Children."

Clerk.—See *infra*, "Probate."

Construction.—*Construed as a Whole.*—See *infra*, "Construed as a Whole.

"Direct."—See *infra*, "Direct."

Gift to Wife—Gift Over to Children.—See *infra*, "Gift to Wife—Gift Over to Children."

Intention of the Testator.—See *infra*, "Intention of the Testator."

Jus Disponendi.—See *infra*, "Jus Disponendi."

Power to Make Advancements.—See *infra*, "Power to Make Advancements."

Prior Decisions Construing Wills.—See *infra*, "Stare Decisis."

Technical and Ordinary Words.—See *infra*, "Technical and Ordinary Words."

Construed as a Whole.—Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared so as to acsertain the general plan and purpose of the testator, if there be one. Nothing is to be added to or taken from the language used, and every clause and every word must be given effect, if possible. Conrad *v.* Conrad's Ex'or, 711.

Devisavit Vel Non.—See *infra*, "Probate."

"Direct."—Testator in his will "directed" that his debts and liabilities be paid from the proceeds of the unsecured debts, that his secured claims and stocks, so far as regarded as safe by his executrix, should be kept as investments, that his life insurance be collected and the proceeds invested, that his real estate should be sold, and that the interest on all investments collected by his executrix should be applied to her support and the support of her children. Held: That the word "direct" was not used in the sense of an

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WILLS—Continued.

"Direct"—Continued.

imperative command or direction, but must be construed as meaning "advise." Conrad *v.* Conrad's Ex'or, 711.

Estate.—See *infra*, "Jus Disponendi."

Execution.—Where the proponents of a purported will, written by one other than the testatrix, failed to show that the testatrix either signed or acknowledged its execution in the presence of the subscribing witnesses, it is error to admit the paper to probate under Code of 1904, section 2514. Albert *v.* Stafford, 338.

Gift for Benefit of Wife and Children.—A gift to a wife for the benefit of herself and children, or words to like effect, is a gift to the wife, and the children take no interest or estate in the property given, and are only mentioned to express the motive for the gift to the wife. Conrad *v.* Conrad's Ex'or, 711.

In the instant case testator provided, "That the interest on all said investments be collected by my executrix and applied to the support of herself and our children." The executrix was testator's wife. Held: That the wife of testator took the absolute property in the income of his estate, and that the children had no interest therein. Conrad *v.* Conrad's Ex'or, 711.

Gift over.—See *infra*, "Jus Desponendi."

Gift to Wife—Gift over to Children.—A testator provided that, "At my wife's death all of my estate should be so apportioned among my children so as to give to each an equal share of the whole." It was contended that this clause gave a vested remainder to the children in the estate. There would be much force in this contention, if the previous provision of the will had simply given the wife a life estate in the whole, with power to make advancements, but this was not the case. The language is by no means mandatory. It was simply the expression of opinion of the testator upon matters as they then stood. The use of the word "should" indicates that it was a mere suggestion, and that the subject was nevertheless left to the discretion of the wife. Conrad *v.* Conrad's Ex'or, 711.

Intention of the Testator.—The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law.

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WILLS—Continued.

Intention of the Testator—Continued.

or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the *expressed* intention of the testator which is sought. Conrad *v.* Conrad's Ex'or, 711.

Where Intention is Plain.—It is not permitted to interpret what has no need of interpretation. Conrad *v.* Conrad's Ex'or, 711.

See *infra*, "Construction."

Intestacy.—See *infra*, "Partial Intestacy."

Isolated Clauses.—See *infra*, "Construed as a Whole.

Joint Wills.—*Consideration for Contract.*—It is not essential that in order for a joint will to be mutual or reciprocal that each co-testator receive some advantage thereunder from the other. Williams *v.* Williams, 643.

Where reciprocal testamentary provisions are made for the benefit of a third party, there is a sufficient consideration for the contractural element in the will (assuming that the contract itself is established) to entitle the beneficiary to enforce the same in equity. Williams *v.* Williams, 643.

Evidence of Agreement and Consideration.—Undoubtedly the proof of the agreement and consideration must be clear and satisfactory; but proof of a testamentary compact may expressly appear in the language of the instrument, or it may be supplied by competent witnesses who testify to admissions of the testators, or it may result as an implication from the circumstances and relations of the parties and what they have actually provided for by the instrument. Direct evidence is not necessary. Williams *v.* Williams, 643.

In the instant case, the situation of the parties with reference to the respective lands devised, their relationship to the beneficiaries, their statements to the witnesses, taken with the provisions of the will itself, leave little room to doubt that the division of the property was the result of a mutual agreement between the co-testators, husband and wife, which, at the death of the wife, became fully executed on her part and irrevocable by the husband. Williams *v.* Williams, 643.

Revocation.—Generally speaking, wills are in their nature ambulatory or revocable, and cannot be made other-

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WILLS—Continued.

Joint Wills—Continued.

Revocation—Continued.

wise, even by the most express terms. This inherent quality of revocability belongs to all wills which do not partake of the nature of a contract. The mere fact that the will is made jointly by two or more testators does not affect the right of either to revoke the same at his pleasure, whether the revocation be made before or after the death of the others; but the fundamental reason for this rule is that every purely testamentary disposition of property is in the nature of a gift, and a different rule applies where a contract "is disguised under the name and appearance of a will." In the latter event the contractural nature of the instrument does not necessarily defeat its character as a will, but enables the party for whose benefit the contract was made to prevent, by resorting to a court of equity, a revocation which would destroy the compact or the trust created thereby. Williams *v.* Williams, 643.

Specific Performance.—While a court of probate cannot admit a joint or mutual will to probate as the will of one of the testators who has revoked the same on his part, it has long been well settled that a court of equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent fraud, may, in a proper cause, enforce the agreement, notwithstanding a revocation by one of the parties, by decreeing specific performance of the agreement, or by fastening a trust on the property in favor of the beneficiaries of the will revoked in violation of the agreement. Williams *v.* Williams, 643.

Validity.—The doctrine of the earlier authorities was that all joint wills were invalid; but it is now settled that such wills are good and may be admitted to probate successively upon the death of each testator as his separate will. Williams *v.* Williams, 643.

Jus Disponendi.—Where a person is given absolute dominion over property, whether the estate be legal or equitable, this constitutes a gift of the property itself, and that any gift of "what remains at her death" or "such part as she may appropriate," or the like, is void. Conrad *v.* Conrad's Ex'or, 711.

In the instant case testator directed "that the interest on all said investments should be collected by my executrix and applied to the support of herself and our children, but

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WILLS—Continued.

Jus Disponendi—Continued.

should such income, in the opinion of my executrix, prove inadequate for that purpose, then she might use the principal to any extent she may desire." Held: That executrix, who was testator's wife, had an unlimited power of disposal during her lifetime of the estate devised and bequeathed by the testator's will. Conrad *v.* Conrad's Ex'or, 711.

Partial Intestacy.—A will contained the following clause: "That my real estate, except my dwelling, which is owned jointly with my wife, be sold at public or private sale by my executrix, and the proceeds be invested as directed in the preceding clause." Held: That the testator died intestate as to his one-half interest in the property described as my dwelling house. Conrad *v.* Conrad's Ex'or, 711.

Power to Make Advancements.—A will contained the following provision: "As our children become of age or marry, my executrix may make such advancements of the principal of my estate to them as she may think proper—provided that she secure to herself a net income during her life of fifteen hundred dollars a year." Held: That the power to make advancements conferred was limited only by the discretion of the executrix, the wife of the testator and mother of the children. Conrad *v.* Conrad's Ev'or, 711.

Prior Decisions Construing Wills.— See *infra*, "Stare Decisis."

Probate.— See *infra*, "Joint Wills."

Where the proponents of a purported will, written by one other than the testatrix, failed to show that the testatrix either signed or acknowledged its execution in the presence of the subscribing witnesses, it is error to admit the paper to probate under Code of 1904, section 2514. Albert *v.* Stafford, 338.

Devisavit Vel Non.—A bill praying for an issue *devisavit vel non* cannot be filed where the will has been admitted to probate before the clerk and no appeal has been taken, nor can it be filed where the persons interested in the probate have been summoned and contested the validity of the will. Queensbury *v.* Vial, 219.

Judgment of Clerk.—The clerk in admitting a will to probate acts in a judicial capacity, and the order made by him admitting or rejecting the will is as much a judgment as though entered by a court. His judgment is a judg-

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WILLS—Continued.

Probate—Continued.

Judgment of Clerk—Continued.

ment *in rem* whose validity can be drawn in question only by appeal in the manner and within the time prescribed by law. It cannot be collaterally assailed. Queensbury *v.* Vial, 219.

The judgment of the clerk entered in the instant case with reference to the paper offered as a will was that "the clerk doth admit the same to probate as good for the last will and testament of" the testatrix. The adjudication of the clerk that the paper is the true last will and testament of the testatrix was an adjudication not only that the will was duly executed, but of all other questions necessary to the validity of the testamentary act, and this adjudication could not be assailed except in the manner pointed out by the statute. If for any cause the appellants desired to contest that adjudication the statute gave them an appeal of right within one year. This appeal, if taken, would have transferred the case to the circuit court of the county, and the statute declares that when so transferred the court should hear and determine the matter as if it had been presented to said court in the first instance, that is to say, there would have been a trial *de novo*. Section 2542, Code of 1904, provides how such trials shall be conducted. Queensbury *v.* Vial, 219.

Jurisdiction of Equity.—Courts of equity have no inherent jurisdiction to set aside wills on the ground of fraud, undue influence, or lack of testamentary capacity on the part of the testator. Jurisdiction of these questions is to be found solely in the statute on the subject. Code 1904, section 2544. Queensbury *v.* Vial, 219.

Specific Performance.—See *infra*, "Joint Wills."

Stare Decisis.—As it is extremely rare to find two cases alike in all respects, little or no aid can be derived by a court in construing a will from prior decisions construing other wills. It is not enough that the same words in substance, or even literally, have been construed in other cases. It often happens that the same identical words require different constructions, according to the context and the peculiar circumstances of each case. Conrad *v.* Conrad's Ex'or, 711.

Subscribing Witnesses.—See *infra*, "Executions."

Technical and Ordinary Words.—Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense.

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WILLS—Continued.

Technical and Ordinary Words—Continued.

If words or phrases are used which have a well defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent, especially when used by one having knowledge of such significance. Conrad *v.* Conrad's Ex'or, 711.

Wife.— See *infra*, "Gift for Benefit of Wife and Children."

WITNESSES.

Hypothetical Question.— See SALES.

Refreshing Memory.—Where a witness, who had made certain written reports was upon the witness stand with the reports in his hand, refreshed his memory from time to time therefrom, and might have testified, and indeed did testify, as to every fact therein contained which was deemed pertinent by either of the parties, it was not error to exclude the reports themselves. Stuart, Gov. *v.* Smith-Courtney Co., 231.

Transactions with Deceased Persons.—In a suit to determine whether certain gifts from a parent to a child and her husband were gifts or advancements, the donor being dead the recipients of the gifts are not competent witnesses to explain that the gifts were not intended as advancements. Johnson *v.* Mundy, 730.

WORDS AND PHRASES.

Curtilage.—Pettus *v.* Commonwealth, 806.

"Direct."— Conrad *v.* Conrad's Ex'or, 711.

"Merchantable Timber."—Adams v. Hazen, 304.

"Principal Place of Business."— Union Tanning Co. *v.* Commonwealth, 610.

"Principles of the Cause."— Johnson *v.* Mundy, 730.

Public Place.—Gregory *v.* Hubard, 510.

Transfer Papers.— Adams *v.* Hazen, 304.

"Unmarried."—The word "unmarried" originally and ordinarily means, it is true, *never having been married*, but the term is a word of flexible meaning and slight circumstances will be sufficient to give the word its other meaning of *not having a husband or wife at the time in question*, and as the term is used in section 2286-a, Code of 1904, it has the meaning of "not having a husband" at the time of the suit or action. Keister's Adm'r *v.* Keister's Ex'or, 157.

X-RAY. See EXPERT AND OPINION EVIDENCE.

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